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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8931 of 2000

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CENTRE POINT WELFARE ASSOCIATION

Versus

NITA INTERNATIONAL

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Appearance:

MR AJ PATEL WITH MR SA DESAI for Petitioner

MR DD VYAS of M/S.VYAS ASSOCIATES for Respondent No. 1

MR AMIT M PANCHAL for Respondent No. 2

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WITH

SPECIAL CIVIL APPLICATION No 8781 of 2000

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NITA INTERNATIONAL

Versus

AHMEDABAD MUNICIPAL CORPN

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Appearance:

MR DD VYAS of M/S.VYAS ASSOCIATES for Petitioner

MR AMIT M PANCHAL for Respondent No. 1

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WITH

SPECIAL CIVIL APPLICATION No 8553 of 2000

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NITA INTERNATIONAL

Versus

AMC

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Appearance:

MR DD VYAS of M/S.VYAS ASSOCIATES for Petitioner

MR AMIT M PANCHAL for Respondent No. 1

MR MC BHATT for Respondent No.2

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WITH

SPECIAL CIVIL APPLICATION No 8930 of 2000

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NIJHAWAN TRAVELS PVT LTD GSA OF BRITISH AIRWAYS

Versus

NITA INTERNATIONAL

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Appearance:

MR PC KAVINA for Petitioner

MR DD VYAS for respondent No.1

MR A.M. PANCHAL for the respondent No.2

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For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

and

Hon'ble MR.JUSTICE RAVI R. TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CORAM : MR.JUSTICE B.C.PATEL

and

MR.JUSTICE RAVI R. TRIPATHI

Date of decision: 08/03/2001

C.A.V. JUDGEMENT

(Per : MR.JUSTICE B.C.PATEL)

#. Special Civil Application No. 8931 of 2000 has been filed by Centre Point Welfare Association. S.C.As. No. 8553 of 2000 and 8781 of 2000 have been filed by the Nita International. Spl. C.A. No.8930 of 2000 has been filed by Nijhawan Travels Pvt. Ltd., occupier of shops

No. 54 and 48.

#. On 17/8/2000 it was stated before the Court by the learned counsel appearing for the Centre Point Welfare Association- occupiers, (hereinafter referred to as "Association" or "Occupiers") that all the 4 complexes i.e. A, B, C and D shall not be used for the purpose other than residence and they shall discontinue the use as office complex by mid-night of Sunday - 20/8/2000.

#. On 1/9/2000 the Court passed an order in Civil Application No. 7851 of 2000 to the effect that the matter is already pending before the Apex Court and hence the Court is not in a position to pass any order more particularly when the cognizance is already taken by the Apex Court.

#. S.C.A. No. 8781 of 2000 was filed by Nita International for quashing and setting aside the notice dated 20/7/2000 u/S. 260 (1) of the Bombay Provincial Municipal Corporations Act (for short 'the BPMC Act') and notice u/S. 260 (2) of the BPMC Act dated 5/8/2000. It was also prayed that the respondent Corporation should seal the shops and offices in Centre Point since the same are being used without Building Use permission (hereinafter referred to as "B.U. Permission") and the petitioner requested to direct the Ahmedabad Municipal Corporation (for short "Corporation") to remove the shops from the cellar as the shops were constructed against approved plan and to see that the space is made available for the purpose of parking. The petitioner also prayed for a direction to the Corporation to provide fire safety measures as the developer/builder has not provided.

#. The Division Bench heard the matters and considered the submissions made by the learned counsel for the petitioners - occupiers - shop keepers that they were not only cheated but were defrauded; that the builder had acted in breach of the provisions contained in the law and therefore, they should not be made to suffer. The Court considering the decision of the Apex Court in the case of MANJU BHATIA V/S. NEW DELHI MUNICIPAL COUNCIL AND ANR. (1997) 6 S.C.C. 370 and particularly para. 12, of the judgment, issued notice to the builder firm and also its partners (hereinafter referred to as "Builder"). In response to the notices, the Builder M/s. Hasmukh Shah and its partners Mr. Hasmukh Shah and Mr. Upendra Shah appeared before the Court.

#. Before considering the submissions made by the learned counsel for the Builder, it would be just and

proper to consider the background. The Court found that the use of the building was not in conformity with the zoning regulations in so far as the building in question is concerned. The plans were submitted for the use of the construction of the building for the purpose of residence only with certain number of shops to fulfil the need of the persons who may occupy the building or the residents of nearby areas. The tower in question was erected contrary to the building regulations. Instead of the use for the purpose of the residence, the tower in question was being used for the purpose of office complex. The Court pointed out that such use will cause nuisance and/or annoyance to the other genuine occupiers of the building. People who have purchased the property for the purpose of residence, if were told that part of the building is to be used for the purpose other than the residence, then they may not have purchased a flat in such a tower as the buyers may think that they will not get peace on account of the nuisance and annoyance which is a necessary consequence of commercial use. When people are buying the property with the bonafide belief that they will have a good residential complex and without disturbance of others they will be in a position to enjoy a housing accommodation, they must be permitted to enjoy the property for the purpose for which they have spent. The Court found that from the inception several illegalities were committed and the officers of the Corporation had not taken any measures to stop the same.

#. The Court noticed that in the cellar and on the ground floor the Builder instead of providing common amenities and parking, converted the area of common amenities and parking into shops and disposed of as such. Learned counsel appearing for the petitioners - occupiers pointed out that the documents were stereo-typed, and, there was no mention about the permission for construction of shops in large number, being granted by the Corporation It seems that they were persuaded to buy the shops. The shops constructed in the cellar as well as on the ground floor were in contravention of the provisions of the building regulations. Before the Court the fact that the construction of shops being shops nos. 1 to 27 in the cellar and shops nos. 28, 29, 30, 31, 44, 45, 46 and 48 on the ground floor were not in accordance with the building regulations, and thus the construction was unauthorised, was not disputed. It was pointed out in the judgment that common amenities were required to be provided in the building. The area meant for common amenities cannot be used for any other purpose, i.e. for shops or parking. The Court pointed out that the common amenities will provide an opportunity to the occupiers to

live in real society. The Court expressed the opinion that when the construction is not in conformity with the regulations it cannot be permitted to stand and should be removed without fail. The Court also noted that for all these years the residents of this building could not raise their voice though the building was used for the purpose other than for which the plans were submitted and approved. The Court also found that the Builder constructed a wall and boundary with a view to facilitate shop keepers to carry on business in the place which was meant for parking and/or common amenities. The Builder charged huge amount for this. The Court was of the view that the breach cannot be pardoned and cannot be permitted to continue.

#. The Court also noted that the 9th floor of the building was not approved by the Corporation. The copies of the plans were placed before the Court which were signed by the office bearers of Amichand Park Cooperative Housing Society Limited (hereinafter referred to as 'society') as the owner, Shri R.H. Patel as Engineer, Shri Jayesh J. Desai as Structural Engineer, and Shri Patel R.H. as Clerk of Works. From the plans, it was clear that the same were signed by one Mr. Upendra Shah as owner and as an office bearer of the society. It is clear from the judgment that it was submitted before the Court that at the relevant time he was the person having control over Amichand Park Coop. Housing Society Ltd. The grievance was made before the Court by learned Advocate for Association Mr. Patel that even the day on which the judgment was delivered, the administration was not handed over by said Upendra Shah to the members of the Cooperative Housing Society, who are actually occupying the building for residential purpose. The grievance was made that though they are the best persons to look after the building, its administration is yet not handed over to them and control rest with the said Upendra Shah, a builder and a partner of M/s. Hasmukh Shah.

#. The Court pointed out that the plan (sheet no.8) shows the height of the tower in question. In all 8 floors were to be constructed. The plan shows that there is 3 mtrs. height of cellar. The cellar plinth is of 2 mtrs. Thereafter, there are 8 floors each consisting of 2.60 mtrs. The height of the building as indicated in the plan was 30 mtrs. without taking into consideration the height of parapet wall on the terrace. The Court pointed out that as per the building regulations it was not permissible to erect a building having more than 30 mtrs. height. The plan also shows that the building

with the height of 30 mtrs., was sanctioned by the Corporation. There was no sanction to erect or construct 9th floor. The Corporation granted permission being permission no. 28 dated 12/8/1992, which is clear from the stamp put on the plans. The Court was convinced that construction was not in accordance with the approved plans but was in violation of building regulations and bye-laws. It was clear from the documentary evidence placed on record that:-

(i) construction of shops in the cellar was in contravention of the provisions contained in the building bye-laws, regulations, etc.

(ii) Shops on the ground floor bearing nos. 28, 29, 30, 31, 44, 45, 46 and 48 were not part of the original plan and were constructed not in accordance with the regulations and bye-laws and also plans which were submitted before the Municipal Corporation and approved by the Corporation. These Shops were constructed without any sanction.

(iii) That the 9th floor which was constructed in the tower in question was in breach of building regulations and no permission whatsoever could have been granted by the Commissioner. Though no permission was granted, the builder erected 9th floor.

##. The construction was admittedly therefore in breach of the building regulations. By detailed judgment considering the submissions made by the learned counsel the Court arrived at the conclusion aforesaid. The Corporation demolished particular part of the building which was contrary to the building regulations.

##. Ilyias Chataiwala, member of the association i.e. Centre Point Welfare Association has filed an affidavit interalia pointing out that the tower no.1 in Centre Point, the building in question has been constructed by the builder / organisers / Contractor M/s. Hasmukh Shah in violation of the provisions of the B.P.M.C. Act and the building regulations framed thereunder consciously with a view to dupe the members of the association. It is specifically averred in the affidavit that it has been disclosed during the proceedings before this Court that the builder firm had constructed the shops in the area which was earmarked for the purpose of parking and for providing common amenities for the benefit of the occupiers of the tower. It is also averred that the

entire 9th floor has been constructed without even getting the plans approved for the said floor from the Corporation. He has submitted that the plans were submitted in 1984. The plans were approved in the year 1992. Though there was no reference to construction of 9th floor in the plan the builder has constructed 9th floor.

##. In the affidavit, it is further pointed out that the contractor constructed 27 shops in the lower plaza and 8 shops in the upper plaza in contravention of the building regulations. The Corporation demolished the shops which were unauthorisedly constructed. The persons who purchased the shops did not know at the relevant time that the contractor/builder constructed the said shops in violation of the building regulations. The persons purchased the shops in question in good faith from the builder firm and they signed the agreement. According to the deponent on behalf of the association, the agreements are illegal and the signatures were obtained on the information furnished by the builder that the construction of the entire building was strictly in accordance with law. The shop keepers purchased the shops and established their business by investing huge amounts. In view of the demolition of the shops they are now on the streets and have lost their source of income. According to the purchaser of such shops, a person who has committed wrong is enjoying the fruits of his misdeeds. It is further submitted in the affidavit that it would be practically impossible for shop keepers to find out suitable premises elsewhere in the same area or locality to establish a new business or business in a different locality will take certain number of years to get the business established.

##. The deponent has further stated that the builder passed on the entire tower no.1 as office complex and in view of the fact that it is in residential locality, they had to convert the premises into residence though they paid price for having their offices. Some have converted the office as residence & some of them are in the process of converting the same into residence. It is averred in para 4 that the loss is suffered on account of the fact that the builder has suppressed true facts from the shop keepers as regards the irregularities committed by it in the construction of the building. On behalf of the Association, it is submitted that had the builder/developer disclosed true facts about irregularities, illegalities and unauthorised construction, the shopkeepers and office owners in the building would not have parted with money for shops and

offices. The deponent has stated that the builder cheated the members of the Association and committed breach of trust. It is stated that the persons are entitled to claim damages from the builder for the losses suffered by them.

##. The deponent has referred about the fact that the Building Use permission was never obtained; that the fire safety system was not provided in the building in question. It is further pointed out that the builder has not provided the fire lift though he was under an obligation to provide it under the agreement. It is further averred that the builder was under an obligation to provide basic amenities, water, electricity, fire safety, fire lift, lift, and parking in the building. It is further averred that it was the duty of the builder to provide common amenities in the building at the place earmarked for that purpose in the plans.

##. The deponent has referred Section 57 of the Bombay Land Revenue Code with a view to point out that without paying conversion charge to the State Government, the builder has disposed of the property in violation of the provisions contained in the Bombay Land Revenue Code. It was his obligation to pay these charges to the Government.

##. Excluding 9th floor, total area of demolished shops comes to 7419 sq.ft and considering the present market value at the rate of Rs.3500/- per sq.ft. loss suffered by the shop keepers comes to Rs.2,59,66,500/-. Considering the amount of furniture and fixtures at the rate of Rs.750/per sq.ft. they have suffered a loss to the tune of Rs.55,64,250/-. They have indicated goodwill at the rate of Rs.750/- per sq.ft. which comes to Rs.55,64,250/-. Considering the Misc. Expenses i.e. electric connection, telephone etc. at the rate of Rs.200/- per sq.ft. comes to Rs.14,83,800/-. The Association has also pointed out that the cost of the second lift, fire safety equipment, borewell etc. comes to Rs.50 lacs and thus total sum of Rs.3,80,14,550/- is the approximate damage suffered by the members of the Association. Over and above conversion charges from the residence to commercial or the difference between market rate for residence and commercial premises is to be paid by the builder. It is contended that the members of the Association purchased the building for their offices. It is for the builder/developer who is engaged in the business of building construction to know that the area is in "residential zone" and the premises could be utilised only for the permissible uses in a predominantly

residential zone and no part of the building can be used for the purpose of office complex etc. yet the builder has asked the members to purchase for their offices. It was his duty not to offer the building for office purpose, yet with a view to earn wrongful gain he has put others to wrongful loss and not only the shop keepers whose shops are demolished but even the present occupiers of the building who purchased offices in the building for the purpose of offices are suffering as they cannot make use of the building for office purpose.

##. On behalf of the Association, Shri Pranlal Kalaria has also filed an affidavit on 21.9.2000 pointing out the breaches committed by the builder. It is pointed out in para 5 that the brochure clearly reveals that the shops were proposed to be constructed in the lower plaza. These details were misleading. Infact, the portion below the lower plaza was required for the purpose of parking as emerged during the proceedings and according to the plans sanctioned by the Ahmedabad Municipal Corporation. He categorically stated that all the members were told that the plans as indicated in the brochure were approved by the Municipal Corporation. He has specifically stated that what was shown to the members at the time of purchase of individual units was infact the brochure and not the approved plans. Zerox copy of the brochure is produced on record. He has also pointed out that the agreements were entered into with the builder during the period between 1988 and 90 i.e. much before the plans were approved by the Municipal Corporation. According to the deponent there was no question of plans being approved and being shown to the members before buying the property as the plans were approved much after completion of construction. The deponent Shri Pranlal has stated that the builder has come out with false statements on oath with a view to suit his purpose and that is further demonstrated by the fact that the construction of the 9th floor in the tower in question was never under contemplation in any of the plan submitted to the Corporation. The deponent Shri Pranlal has stated that "I say that infact no plans were shown to any of the members of the association and infact no plan contemplating the construction of the 9th floor in this plan exists today.". In view of this clear picture, Shri Pranlal has stated that the builder has made false statements on oath. It is clearly stated by Shri Pranlal that in the year 1989 the builder commenced the construction of tower no.1 as commercial building without approval of the plans as it now emerges. In the agreement, it is clearly stated that the members were allotted either shops or office premises. Some have not

entered into any agreement but they have been given allotment letters and in the said allotment letters, it is clearly indicated that they were allotted commercial units. Thus, contrary to the building regulations, in a residential zone, commercial complex was constructed and units were allotted. The builder has never sold or allotted the premises in question as residential units to any of the members of the association. From the purchasers about 90% of the amount was taken prior to handing over possession. In Para 9, Shri Pranlal has pointed out that as per Item No. VIII of clause 5 of the xerox copy of the agreement, fraction of the purchase price was required to be paid against possession of the unit. As per the said clause only 10% of the total purchase price was required to be paid against possession. It is also indicated in the affidavit by Shri Pranlal that the modus operandi adopted by the builder was with an intention of placing a member of the Association who does not pay the balance amount at the time of taking over possession in an embarrassing position, in as much as if he does not pay the amount or if he refuses to sign the agreement, he would not be given possession of the unit even though he might have paid substantial amount towards purchase price and he would also not be refunded the amount which he might have paid till that date. Such amount was to be paid only after re-sale of the property. According to the Association, the members were thus left with no alternative but to sign the agreement irrespective of the recitals being prejudice to their interest. It is specifically averred by Shri Pranlal that the builder has placed himself in a dominating position as against the servient position of the purchaser and the members were left with no alterative but to sign the agreement irrespective of the recitals being prejudicial to their interest. Shri Pranlal has also referred about goodwill & huge investment made by them in the shops and offices and has prayed to direct the builder to pay the amount by way of damages. The Association has also made a grievance that the builder has come out with a case that the builder entered into an agreement with Amichand Park Cooperative Society but the details of such agreements are not made known to the Association. Even records of the society have not been handed over to the Association by the builder. All the members are not given share certificates. Apart from disposing the space meant for parking and common amenities by construction of unauthorised shops, the Association has pointed out that the terrace was meant for the welfare of the Association/Society. The terrace belongs to the society. The terrace contained drainage lines, electric lines and

telephone cables. In flagrant violation of rules and in breach of law, the builder has assigned the rights in favour of Nita International with a view to earn huge profit.

##. It is also pointed out by the Association in the affidavit that the builder has laid much stress on the fact that the allottees/purchasers of the shop have taken possession. It is an eye wash. The buyers were required to pay to the builder amounts towards purchase price from time to time. It is pointed out in Para 21 that the builder handed over the possession to the concerned allottee. Clause XIX which is reproduced in the affidavit of the builder if read, it is evident that it was stated that "the entire project including the office complex is not yet completed". Thus it is clear that in residential zone, office complex was constructed. This is not permissible and Corporation cannot permit the use of buildings for any other purpose than indicated in the predominantly residential zone. The builder/developer has disclosed his tactic apprehension that the permission as required might not be granted because some construction was carried out in contravention of the building regulations and with a view to circumvent the obligation of the builder/developer for obtaining permission, the phrase was incorporated in the clause. The builder/Developer was under an obligation to pay compensation to the members of the Association in case any unit or any portion of the unit was required to be demolished or is not allowed to be used as office. As stated by the Association nearly 90% of the purchase price was paid by the occupants to the builder in good faith before completion and occupation of the building and therefore members were left with no alternative but to sign the document i.e. the possession receipt as required by the builder.

##. The Apex Court in the case of CENTRAL INLAND WATER TRANSPORT CORPN. LTD. vs. BROJO NATH reported in AIR 1986 SC 1571 had an occasion to consider unconscionable contracts. In the instant case there was gross inequality of the bargaining power together with terms unreasonably favourable to the stronger party, viz. the builder. It was not a standard agreement. In paragraph 84 of the aforesaid case (AIR 1986 SC 1571), the Court pointed out about reasonableness or fairness of clauses in contract where there is inequality of bargaining power. The Apex Court also considered a case of GILLESPIE BROTHERS & CO.LTD. vs. ROY BOWLES TRANSPORT LTD reported in (1973) 1 QB 400. The Apex Court also considered the case of LLOYDS BANK LTD. vs. BUNDY

reported in (1974) 3 ALL ER 757 wherein Lord Dennig first clearly enunciated his theory of 'inequality of bargaining power'. The Court emphasised the observations that :

"There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. ..."

The Apex Court also considered the speech of Lord Diplock in paragraph 85 of the judgment. We reproduce the part which was emphasised by the Apex Court:-

" Was the bargain fair?. The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract. For the purpose of this test, all the provisions of the contract must be taken into consideration".

In paragraph 90, the Apex Court observed as under:-

"Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to 'uphold the Constitution and the laws'. The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in

consonance with right and reason, intended to secure social and economic justice and confirms to the mandate of the great equality clause in Art.14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No Court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however, unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporation with their vast infrastructural organisations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

##. Mr. Patel, learned advocate for the Association submitted that facts and circumstances narrated by him clearly indicate that the builder in the instant case was

in a stronger position. He took almost 90% of the amount and the shopkeepers had no alternative but to enter into the agreements. According to him, therefore also, the agreement is not binding. We make it clear that we are not deciding the matter solely on the ground that the agreement is not binding, but we are disposing of these matters on various other grounds stated in this judgment. However, suffice it to say that reading several clauses of the contracts, it is clear that the builder, after collecting major amount (90%) towards purchase price, executed the documents having all conditions in his favour. Shopkeepers had no voice in change of plans that may be required at the instance of Corporation. No provision with regard to return of money if plans were to be changed or varied was made. About return of money, shopkeepers were not certain as to when they will get the amount back, if subsequently declined to make the full payment. It was builder's obligation to first get the plans approved, and after construction, to inform Corporation in time and only after B.U. Permission is granted to allow the persons to occupy. Despite legal obligation, without such permission, the builder put the shopkeepers in possession. Reading the entire document which was read and re-read in Court by counsel for parties, in the facts and circumstances of the case narrated, it leaves no doubt that the aforesaid principles will have to be applied in the facts of the present case.

##. Both the sides, viz. the shopkeepers and the builders have referred to Articles of Agreement and the terms of the agreement. Clause II of the agreement provides that by virtue of the agreement for sale dated 5.11.1980, the Panchwati Estate Owners Association is entitled to purchase the property as described in the First Schedule to the Agreement. Reading clause 3 of the agreement, it appears that there was an agreement dated 15.1.1981 between the said Association whereby the builders have been given absolute authority and power to enroll members, to construct buildings and to allot shops/flats in the said building on such payments as may be agreed upon from time to time and to do all things and acts necessary and expedient in connection therewith for and on behalf of the Association. It is required to be noted that after the aforesaid date, plans have not been produced before the Municipal Corporation for its approval for the building to be constructed on behalf of the Association, but the plans have been produced by Amichand Park Co-Op. Housing Society Limited. It is not the case of the builder that plans were subsequently drawn on behalf of the Association by the builder. It is

not the case of the Corporation also that the plans were produced on behalf of the Association by the Builder. The builder had right to sell the shops/flats in the said building to different purchasers with a view to ultimately making purchasers of the shops/flats members and shareholders of the Association. About the changes to be made in the plans which were already submitted to the Corporation, we have made a reference earlier, but suffice it to say that the agreement refers that the purchaser irrevocably consented to the builders for carrying out such changes. By the agreement it was not open to the purchaser to further investigate the title of the property and no requisition or objection shall be raised on any matter relating thereto. On the date of execution of the agreement with Nita International, partner of M/s. Hasmukh Shah, Mr. Hasmukh Shah has signed the documents and it is undated. On the date of agreement, by way of deposit or earnest money, a sum of Rs.1 lakh was collected by the builder against the total sum of Rs.2,50,000/-. The remaining sum was to be paid against the possession. The amount is referred as deposit or earnest money in clause 6 also. Promise was given that on 30th July 1989, subject to availability of material, possession will be given. It was specifically mentioned in clause 12 that as soon as the building was notified by the builder as complete, purchaser of the shops/flats shall pay the arrears of the amount within a period of 15 days of such notice and under no circumstances, possession of the property was to be given unless and until all payment required to be made against the agreement was made to the builder. In case of refund, we have indicated as to when the amount was to be refunded. There is a further clause in the agreement that after the building is complete and ready and fit for occupation, and after the Association as aforesaid is registered, and only after all the shops/flats in the said building has been sold and disposed of by the builder and the builder has received all dues payable to them under the terms of the agreement with various purchasers of flats/shops in the said building, the builder shall obtain necessary conveyance of the said property directly in favour of the said Association from original owners.

A conjoint reading of the different clauses of this agreement makes it absolutely clear that M/s. Hasmukh Shah was a 'builder'. Clause 9 of the agreement states that the "builder with the intention of development the said property has arranged to start construction". Hence he is also the 'developer'. It is the builder, who with an intention to develop the

property commenced the activities, and as per clause 3 had the 'power to enroll members' which clearly indicates that the builder was the 'promoter' of the scheme.

##. To regulate promotion of the construction of, and the sale, management and transfer of flats on ownership basis and to provide for the ownership of an individual apartment and to make such apartment heritable and transferable, the legislature, after receiving the assent of the President, has enacted an act known as the Gujarat Ownership Flats Act, 1973 (hereafter referred to as the Flats Act). By Notification No. GH/J 14 (A)/73 FOB-1473-A(i) published on 1.8.1973, the Government of Gujarat appointed 1st August 1973 as the date on which the said Act came into force in the areas of Ahmedabad Municipal Corporation and other Municipal Corporations. Similarly, by Notification No. GH/I 15 of 83/FOB-1473/TH published on 16.6.1983 the Government of Gujarat appointed 16th May 1983 as the date on which the flats act came into force in the area of AUDA and other Urban Development Authorities. It is required to be noted that the Developer in the instant case has violated the provisions of the Flats Act.

Section 2 (a) defines 'flat' as under:

> 2.(a). "" "Flat" means a separate and self-contained set of premises forming part of a building and used or intended to be used for residence, or office, or show-room, or shop or godown or garage; and includes an apartment.
>
> Explanation.- Each set of premises shall be deemed to be separate, and self contained notwithstanding that common provision is made for sanitary, washing, bathing or other conveniences in respect of two or more sets of premises. ""

Section 2 (c) defines 'promoter' as under:-

> 2.(c). "" "promoter" means a person who constructs or causes to be constructed, a block or building of flats for the purpose of selling on ownership basis some or all of them to other persons, or to a company, co-operative society or other association of persons, and includes his assignees; and where the person who constructs or causes to be constructed and the person who sells are different persons, the term includes both."

Section 4 of the Flats Act provides that before

accepting advance payment or deposits, the promoter has to enter into an agreement and the agreement is required to be registered. The said section 4 reads as under:

"Notwithstanding anything contained in any other law for the time being in force a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis shall, before he accepts any sum of money as advance payment or deposit, which shall not be more than 20 per cent of the sale price, enter into a written agreement for sale with each of such persons who are to be taken or who have taken such flats, and the agreement shall be registered under the Registration Act, 1908 and such agreement shall contain the prescribed particular; ... "

Section 5 of the Flats Act mandates that whatever amount received is to be credited as advance or deposit and any sum so taken is to be kept in a separate bank account.

In the instant case, it is clear that more than 20% of the amount has been taken as deposit or earnest money, which is clear from the agreement produced on record. Thus, the acceptance of the amount itself is in clear breach of the provisions of the Flats Act.

##. So far as the liabilities of the promoter are concerned, section 3 provides for the same. Section 3(2)(i) reads as under:

(2) A promoter, who constructs or intends to construct such block or building of flats, shall (i). not allow persons to enter into possession until a completion certificate, where such certificate is required to be given under any law, is duly given by the local authority (and no person shall take possession of a flat until such completion certificate has been duly given by the local authority). "

##. Section 7 of the Flats Act contemplates that after the plans and specifications are disclosed, no alterations or additions are to be made without consent of persons who have agreed to take the flats. Reading the section it is clear that the builder is prohibited from making any alterations in the structure of the

building or from making additional structure without the previous consent of all the persons who have agreed to take the flats. The Promoter has to convey title and execute documents accordingly as contemplated under section 11 of the Flats Act. Sub-section (2) of Section 7 of the Flats Act is also required to be taken into consideration. If the approved plans were disclosed by the builder, the occupiers/shopkeepers would have called upon the builder to rectify the defect or would have called upon to pay compensation. The builder, without the approved plans carried out the construction and failed to rectify the unauthorised changes made by the builder after approval. If there was disclosure of the approved plans, action could have been taken by the shopkeepers. The builder, without bothering about the provisions, carried out the construction so as to make a wrongful gain. The act of the builder is in utter disregard to the provisions of law.

##. In the instant case, it appears that in the name of the Co-Operative Society, plans were placed before the Corporation for approval. In the agreement it is mentioned that the Association has called upon the builder by giving absolute authority and power to enrol members and to construct the building etc. and to do everything on behalf of the Association. It is clear that partner of the builder was managing the affairs of the Co-Operative Society at the relevant time. Under the name of the Association, the same person acquired right and title to enrol the members and to sell the property and entered into agreement of sell the property copies of which are produced on record. However, there is nothing to show that any conveyance has been executed in favour of the Association or individually with the shopkeepers. The Flats Act mandates that when the building is to be constructed, it will be the liability of the promoter to construct it according to the plans and specifications approved by the local authority where such approval is required under any law for the time being in force.

##. There are other provisions which we are not referring to in detail. Suffice it to say that the aforesaid provisions were clearly breached in the instant case and the agreement was executed. Apart from the fact that the contract cannot stand in the eye of law in view of the judgment reported in 1986 SC 1571 which we have discussed above, it also appears that the agreement is in contravention of the provisions of the Flats Act and the promoter / builder has not followed the provisions contained in the aforesaid Flats Act and even the officers of the Corporation kept mum.

##. In the affidavit in para 23, the Association has pointed out that the builder has made an averment that "" "the builder is ready and willing to provide such deficit parking as well as common amenities area from this available FSI on the same plot of land" demonstrate the irregularities committed by him in the construction of the building."" It is further pointed out that "" "Similarly as regards the illegal construction of 9th floor, the averments "the builder is ready and willing to refund the cost of the premises received from the allottees" amounts to tacit admission on part of the deponent that the said portion of the building was constructed in violation of the plans sanctioned by the Corporation."" It was submitted by the Learned Counsel appearing for the Association as well as for Nita International that the builder has carried out illegal and unauthorised construction and has duped the innocent persons and therefore they must be awarded adequate compensation.

##. On behalf of the Association, it was pointed out that the original plans were produced before the Court for perusal and the xerox copies were also placed on record. For the first time they came to know that the tower no.1 having 8 storeys in the plan was sanctioned for residential purpose and thus the builder has committed fraud by stating that the property has been constructed for commercial use. Repeatedly before the Court, the Counsel was also asked to produce copy of the plans which according to the builder has shown to the members of the Association but no plans were placed on record. On behalf of the Association, Learned Counsel submitted that it is very unfortunate that the innocent shop keepers and the members put their hard earnings for buying office complex and/or shops relying on the words of the builders. In view of the fact that the brochure was published and relying on that major share was paid before the building was completed. The occupiers were put in possession on full payment. On behalf of the Association, it was submitted that all the shop keepers whose shops are demolished are uprooted and they cannot get themselves established in any central place. It was further submitted that persons who purchased office complexes are not in a position to use as such in view of the fact that it is a residential zone. As per the affidavit of Shri Hasmukh Shah, it was constructed as office/commercial complex. It is clear that it was handed over to the occupiers as such.

##. So far as the contestant i.e. Nita International is

concerned, in July 1989, it entered into an agreement for shop nos. 30 and 31 on the ground floor with the builder. These shops were constructed in the area meant for common amenities. Nita International was also allotted shop no.47 on the ground floor and other shop no.27 in the said complex. The builder entered into an agreement with Nita International for the terrace of shop nos. 30 & 31 along with the right to use the staircase for going to the terrace. It is in regard to these unauthorised construction notices were issued by the Corporation for which suit was filed. Notices were issued under Section 260(1) and 260(2) of the B.P.M.C. Act as also under Section 268 of the B.P.M.C. Act. Notice under Section 268 was issued as building use permission was not obtained. Ultimately Special Civil Application No. 8781 of 2000 was filed. Centre Point Welfare Association filed the application being Civil Application No. 7029 of 2000 which was converted into Special Civil Application No. 8931 of 2000.

##. Nita International in its affidavit has given the area of the shops & the payment made for the shops and the terrace which comes to Rs. 1195750/-. The said Nita International was engaged in the business of hotel and parlour, and spent huge amount for internal decoration and has claimed this amount by way of damages. Nita International has pointed out that in the year 1999-2000 net profit was Rs.24,40,530/for which he has annexed a copy of the statement. The said Nita International stated on oath that the valuation made by very eminent firm i.e. Space Management Limited was to the tune of Rs.1,28,32,500/-. Regarding the availability of the premises on behalf of Nita International, it is pointed out that near Panchvati Circle at the rate of Rs.4000/per sq.ft. area is available and considering the stamp duty and registration etc., it will require to pay huge amount. Other premises near Arvish Auto Showroom, Mithakali is available at the rate of Rs.8000/per sq.ft on the ground floor and Rs.2000/- per sq.ft. in the basement. Nita International has placed reliance on the report of Ajay D Bhatt, approved Architect and Valuer dated 17.7.2000 stating that the valuation including the interior comes to Rs.1,42,65,000/-. In Para 8, Nita International has pointed out that its sister concern had taken a loan from Bank of India where Nita International had given shop nos. 30, 31 and 27 by way of collateral security. Now it is stated that Nita International will have to face lot of difficulties. It is further pointed out that staff of 103 persons was engaged and there would be loss of service to them which would adversely affect the financial liability of Nita International. Nita

International also claimed that several proceedings were required to be initiated not only in the Trial Court but before the High Court and the Apex Court and it had incurred expenditure including fees to the tune of Rs.5 lacs and requested the Court to direct the builder to pay these amounts.

##. It was submitted on behalf of Nita International that the builder by suppressing the material fact and by showing some sketch stating that the plans are approved induced the shopkeepers to buy the property. It was contended that had the builder placed correct facts that the shops are not constructed as per the plan, then Nita International would not have purchased the shops. It was submitted that the Corporation has made it clear that the plans were approved for the first time in 1992, and therefore the builder could not have shown the plan approved by the Municipal Corporation when the deal took place. Before the Court even the Counsel for the builder was called upon to produce the plans approved by the Corporation which were shown to Nita International but the Counsel did not produce any plan. Mr.Vyas, Learned Counsel submitted that from this the only inference that can be drawn is that the builder by showing some plans which may be according to the property constructed but not as per the approved plans made the buyers to believe that the construction is as per the plans. If the persons putting faith on the builder have purchased the property and later on it is found that by suppressing the material fact and by showing some plans which were never approved by the Corporation if the buyers were offered the shops, it can be said that the act was fraudulent and buyers were duped. The plan that is shown in the Brochure does not resemble the plan approved by the Corporation.

##. It is clear that with a view to have a wrongful gain to himself and with a view to cause wrongful loss to the buyer, the builder entered into the agreement. If there was honest intention on the part of the builder he would not have put the occupiers in possession till the plans were sanctioned/approved by the Corporation and the building permission was granted by the Corporation. The builder would have requested the occupiers to wait till the plans are approved. He should not have handed over the possession before the building use permission was granted. After the property was constructed without the approval of the plans by the Corporation, the builder disposed of the property and that reveals that the act was done with an intention of causing wrongful gain to himself and wrongful loss to the buyers and thus the act

was not bonafide. The law requires that there must be completion certificates and permission to occupy or use the building. Section 263 of the Act reads as under:-

263. Completion certificates, permission to occupy for use.

(1). Every person shall, within one month after the completion of the erection of a building or the execution of any such work as is described in section 254, deliver or send or cause to be delivered or sent to the Commissioner at his office, notice in writing of such completion, accompanied by a certificate in the form prescribed in the bye-laws signed and subscribed in the manner so prescribed, and shall give to the Commissioner all necessary facilities for the inspection of such building or of such work and shall apply for permission to occupy the building.

(2). No person shall occupy or permit to be occupied any such building, or use or permit to be used the building or part thereof affected by any work, until -

(a). permission has been received from the Commissioner in this behalf, or,

(b). the Commissioner has failed for twenty-one days after receipt of the notice of completion to intimate his refusal of the said permission."

##. It is not the case of the builder that as per the plan after completion of erection of building as contemplated in Section 263(1), a notice in writing accompanied by a certificate in the form prescribed etc. was given to the Commissioner and that the Commissioner did not take any action on the basis of this application.

##. Sub-section (2) makes it clear that no person shall permit the building to be occupied or used or permit to be used the building or part thereof until permission has been received from the Commissioner. In the instant case before the plans were sanctioned for erection of a building, the building was erected and that too contrary to the plans which could be approved by the Corporation. The plans were approved in 1992 and the construction carried out was contrary to the approved plans. It is the builder who has permitted the shopkeepers to occupy the building or has permitted to use that building without permission being granted by the Corporation.

Building regulations and building rules as found in Chapter XII of Appendix IV of the B.P.M.C. Act is a relevant provision required to be taken into consideration. Rule 10 in Chapter XII of Appendix IV prohibits the use of the building without written permission of the Commissioner or otherwise in conformity in terms of such permission. Reading several sub-clauses it is clear that the building or part of the building can be used for the purpose for which the permission was granted and not for any other purpose. If the building or part of the building is required to be used then permission of the Commissioner is a must. In the instant case, the space shown in the plan meant for common amenities and the parking has been permitted for a different use by the builder by taking money from the shop keepers. Thus, it is in breach of the provisions of the BPMC Act, rules and regulations. It is required to be noted that the builders have not produced any material on record, that they were authorised to dispose of the building (particularly shops erected in parking place and common amenities and 9th floor erected contrary to the provisions of building regulations). If they were authorised by the owner of the building they ought to have placed such document on record. Non-production of such document clearly indicates that without authority, the persons have been inducted in the building which otherwise the owner (Society) could not have permitted to occupy the building.

##. In the Town Planning Scheme, the area in the occupation of the individual holder of land is generally reduced by way of contribution out of that plot for maintaining the services beneficial to the community with an object to provide amenities for the benefit of the residents. Similarly, the parking is to be provided for the benefit of the persons who are occupying the building. Out of the total FSI used 5% is to be provided by way of common amenities for the benefit of persons occupying the flats/building. The Legislature has not given that right to any developer to dispose of the same in the manner which he likes but the law mandates that the builder/developer should see that as per the plans approved by the Corporation, the facilities are provided. These provisions are made to ensure healthy surrounding to the people living in congested localities and to provide facilities conducive to healthy living.

##. At the cost of repetition, we would like to point out that the builder has not produced any material on record pointing out his right to dispose of the property i.e. shops unauthorisedly erected. The builder was not

the owner of the plot, he was merely a developer and it was his duty to develop the plot as per the rules and regulations in the building bye laws and not at his whims and caprice to earn profit by making use of the parking space and public amenities for construction of shops. In absence of any proprietary right in the plot itself as a developer, the developer could have exercised the right which the owner could have exercised for construction of a property but in the instant case, it seems that though the builder had no right in the property, assumed the role of owner of the plot in question and disposed of the property i.e. the shops and 9th floor by way of sale in contravention of various provisions of law. We do not find any agreement signed by the society in favour of the builder while submitting an application to the Corporation for erection of a building permitting the builder to have exclusive right of sale. Even before the Court no document is produced by the builder entitling him to erect the building as he liked and to sell the same.

##. In case of DUNGARLAL HARICHAND VS. STATE OF GUJARAT & OTHERS REPORTED IN 1976 (17) GLR 1153, 3 Judges bench pointed out in paragraph 9 that:

> "For proper framing of schemes and implementing them, the individual rights are made subordinate to the wider social interests of the society and civil amenities. The individual interests are not allowed to outweigh and prevail over the widen social interests so as to thwart or torpedo salutary social schemes of town planning for the benefit of the public as a whole. Schemes such as the one with which we are concerned ought not to be allowed to suffer and individual interests have to be subordinated so as to subserve public good as they are to be expeditiously implemented in accordance with the true legislative intention of the Act. An elaborate procedure is prescribed under the Act and the Rules to achieve the desired objective."

##. In view of the principle enunciated hereinabove, even the society which happens to be the owner of the plot in question could not have disposed of the parking area or the area meant for common amenities as that was meant for the members occupying the building under the scheme and therefore the builder had no right whatsoever to unauthorisedly construct and to dispose of such part.

##. In contrast to the builder's interest, the interest

of the occupiers of the building, which is recognized by law, cannot be allowed to outweigh. The interest of the members would prevail over the individual interest of the builder-developer, who had no right under the statute or the rules to erect the building in contravention of the provisions so as to thwart or torpedo the salutary scheme of the Town Planning Scheme for the benefit of the members of the Society as a whole. As pointed out by the court, the provision for parking is not only in the interest of the members/occupiers of the building, but in the interest of general public as that would reduce the burden on the road as road would be available for movement of traffic and not for parking of vehicles. Division Bench of this Court indicated in the earlier orders passed in these matters as well as in the judgment in A.O. No. 441/98 decided on 6.9.2000 that if the buildings are not erected in accordance with the plans approved, the construction would be unauthorised and against the public interest.

##. It is required to be noted that atleast the Association placed on record illustrative cases and according to us that would clearly indicate as to what could be the real price. Shop No.8 belongs to one Sureshbhai B Rana. He has placed on record that he purchased the property from the erstwhile occupant of that shop on or about 9.3.99 and the purchase amount was Rs.3,75,000/- & considering the size of the shop which is 208 sq.ft. the price would come to Rs.1800/- per sq.ft. Shop No.9 belongs to one Sureshkumar Keshavlal Bhagat who has filed an affidavit interalia pointing out that the shop is situated in the lower level (it is clear from Annexure to the affidavit) and that the possession was taken on 9.3.1999 for which the purchase price paid was Rs.3,80,000/-. Considering the area of the shop being 208 sq.ft. the value would come to Rs.1827/- (to be precise Rs. 1826.92 ps.) One Dineshkumar Mafatlal Parekh who was having shop no.10 has placed on record that from the erstwhile owner he purchased a shop on or about 25.6.1998 and the possession was taken on 27.6.1998. The purchase amount was Rs.1,50,000/-. Considering the size of the shop which is 212 sq.ft. the amount would come to Rs.750/-.

##. In view of the difference stated in the affidavits about the present market value, when we put a pointed question to the Learned Advocate it was stated that there are valuation reports on the record. The structure of the complex is of RCC Frame with brick masonry walls. There was flooring of good material. Concealed wiring is provided throughout the premises. Water and drainage

facilities are provided by Ahmedabad Municipal Corporation. Building is located in fully developed locality and all civic amenities are easily available in the nearby vicinity. Considering the location of the premises, nature of construction and the prevailing market rates in the nearby vicinity, valuation was required to be made. Mr.Vyas, Learned Counsel submitted that it is on these basis the valuer has put the value of the property after inspecting the property. The Architect is also Bank of India panel valuer. He visited the site to determine fair market value of the total property in possession of Nita International, a partnership firm. Report is in great detail and he has recorded the value of Shop No.30, 31, their lower mezzanine and upper level mezzanine floor. He has also indicated the value of Shop No. 47, upper kitchen and store and north and open margin covered with temporary structure. According to Mr.Vyas, Learned Counsel, the total valuation of the property comes to Rs.1,42,65,000/as on 17.7.2000. If M/s. Nita International is required to search the premises for its business in the locality atleast this much amount would be required to be invested. It is submitted that M/s. Nita International provided granite floorings in shops and passage and provided good quality of furniture and fixtures. There was kota stone flooring in the kitchen and store with glazed tile "dado", Open terrace was provided with crazy marble flooring with good quality light fixtures. Ceramic tile flooring was provided in north side margin covered with esthetically good looking temporary structure. Looking to the nature of the construction, location of the premises for shop nos. 30 & 31, the valuer has arrived at the rate of Rs.7500/- per sq.ft. So far as lower mezzanine area is concerned which was of 300 sq.ft. the rate is arrived at Rs.5000 per sq.ft. and the upper level mezzanine which was of 800 sq.ft. the rate arrived is of Rs.4500/- sq.ft. The valuer has considered the price as indicated in the report. Mr.Vyas, Learned Counsel further submitted that considering the price fixed for lower kitchen per sq.ft. at rate of Rs.4500/- & upper kitchen and store at the rate of Rs.1150/- per sq.ft. and the north side open margin covered with temporary structure at the rate of Rs.900/per sq.ft. Learned Counsel Mr. Vyas submitted that the valuer has taken into consideration several aspects, size of the room, location of the room, nature of construction etc. for arriving at a conclusion. He further submitted that M/s. Nita International has spent huge amount for the purpose of business. He submitted that so far as building material, door and ornamental fixtures are concerned, it depends upon the taste of the

person. One may like to have ordinary tiles, one may like to have kota stone, one may like to have ordinary marble and one may like to have pure white marble with double polish for the purpose of flooring, the price of work would vary on account of the material used for the purpose of beautifying the building. It is submitted that even for security one may go for door made from iron grills or one may simply have the door prepared from press wood which is cheaply available in the market. One may use formica with better wood to fix it or one may use teak wood for the purpose of door with polish having better design and ornamental fixtures. One may use simple chain to close the door or one may use ornamental fixture with better locking system.

##. No doubt it depends on the taste of the person and for the purpose for which the building is to be used. Therefore, there would not be the same price for all the shops in question. Mr.Vyas submitted that M/s. Nita International was employing 103 persons that would indicate the size of business which it was carrying on. On the record details of persons working and the remuneration paid is also indicated.

##. Mr. Hasmukh Shah, partner of M/s. Hasmukh Shah Builders, Ahmedabad, filed an affidavit on 6/9/2000. In para. 3 of the affidavit it has been specifically stated by Mr. Shah that the building complex was constructed in or about year 1988-89. The said complex consists of 3 residential towers and one commercial complex. It was stated that shop-cum-residential complex consists of parking place, lower level, upper level and 9 floors. Mr. Hasmukh Shah has relied upon the agreement entered into between one of the shop owners with the Builder. The relevant clauses are reproduced in the affidavit, which are as under :-

> "(1) The Builders will construct a building in accordance with the building plans prepared by M/s. Hasmukh C. Patel, Architects of Ahmedabad, on the said property, more particularly described in the First Schedule hereunder written. It is agreed between the parties that the Builders will be entitled to make changes and variations in the said building plans as required by the Municipal Corporation of Ahmedabad and which the Builders may deem fit and appropriate and the Purchaser hereby irrevocably consents to

the Builders carrying out such changes.

(2) The Purchaser has seen the said building plans and specifications in accordance with which the said building is proposed to be constructed.

(3)
to xxx xxx xxx xxx
(10)

(11) IT IS HEREBY EXPRESSLY AGREED THAT the terrace in the said building shall always belong to the Builders and they shall be entitled to deal with and dispose of the said terrace in such manner as they may deem fit. In the event of the Builders obtaining permission from the Ahmedabad Municipal Corporation or from the Competent authority for additional construction then the Builders shall be entitled to make such additional construction and shall be entitled to dispose off such additional construction constructed by them to such persons at such rate and on such terms as the Builders may deem fit. The builders shall be entitled in that event to allot the said property to any other purchaser and then the said property shall be in exclusive possession of the such purchaser. The builder shall have a right to run a Restaurant or Hotels on the terrace of the said building or let it or sell it for use as a restaurant. The Association of the shops/flats that may be formed by the purchasers of the property shall admit and allow the builders and other persons to go to the terrace of the said building in the Restaurant or Hotels.

##. Thus, it is clear that the plans drawn by M/s. Hasmukh C. Patel, Architect were shown and not the plans approved by the Corporation. It is nowhere stated that the plans approved by the Corporation were shown to the occupiers. Before the plans could be approved, the building contrary to the plans was erected and persons were put in possession contrary to the building regulations. Plans were approved much after the

possession was handed over.

##. Shri Hasmukh Shah has come out with the case that the agreement was executed prior to the commencement of the construction. After the building was constructed a possession receipt was executed on 1/8/1990. The relevant clauses of the possession receipt read as under:-

"(E) I/We undersigned record and confirm the following :

(i) to (xviii) xxx xxx xxx

(xix) The entire project including of office complex is not yet complete and the building use permission is not obtained still the builders have handed over the possession of the premises booked by me at my request and at my risk and responsibilities and on my undertaking and assurance that if any notice or proceeding shall arise by any authority including Municipal Corporation for use and occupation, I/We shall alone be liable and/or answerable for the same and neither the builders, nor the association and/or its office bearers will be liable or answerable for the same.

(xx) to (xxii) xxx xxx xxx xxx"

##. BPMC Act prohibits the occupancy of a building without B.U. Permission. At the same, it says that no person shall permit any one to occupy the building or shall not permit anyone to use the building. (We have discussed this aspect in paragraphs 32, 33 and 34 earlier). Thus, the person erecting the building and in the instant case, the builder who entered into separate agreements with others in the name of development of land permitted others to occupy the building. Mr. Upendra Shah, partner of M/s. Hasmukh C. Shah, was in fact, the person erecting the building in the name of society. On behalf of the Builder i.e. Mr. Upendra Shah, Mr. Hasmukh Shah executed the documents. Thus, persons were permitted to occupy the premises in contravention of the provisions of law or were illegally put in possession. To cover up this, in possession agreement, reference is made of clause (xix). If act committed is illegal, the

liability of such illegal act cannot be fastened on others. The person who has committed such illegal act cannot be exonerated.

##. Upendra Shah, partner of M/s.Hamukh Shah, has placed on record his affidavit interalia stating that none of the parties - either Nita International or the occupiers of the building who are the members of the Centre Point Welfare Association are entitled to any relief against the builder. The builder or its partners were not parties to the original proceedings. Therefore, by way of present proceedings no relief can be granted. It was contended that the High Court cannot invoke extra ordinary jurisdiction under Article 226 without evidence being laid and on mere oral submissions the relief cannot be granted. However, it is required to be noted that on the record necessary documents have been produced by the parties and therefore it is not a case where there is no documentary evidence and that the Court is required to pass an order on mere oral submissions.

##. It is further contended in the affidavit that each and every occupier was aware about all the true facts and state of affairs and had full knowledge and information regarding permission for construction granted by Ahmedabad Municipal Corporation, the zone in which building was constructed and also the fact that the Building Use Permission was not granted by the Corporation till they were put in possession.

##. In para 8 of the affidavit, it is stated that no action was proposed to be taken by the Commissioner under Section 260 of the B.P.M.C. Act. Therefore, the claimants ought not to have consented for passing order of demolition of respective premises occupied by them.

##. It seems that the deponent Shri Upendra Shah has not come to the Court with clean hands. Special Civil Application NO. 8781 of 2000 has been filed by Nita International for quashing and setting aside the notices under Section 260(1) & 260(2) of the B.P.M.C. Act. Along with Special Civil Application No.8781 of 2000, the judgement delivered by City Civil Court is annexed from which it is clear that the Corporation issued notice under Section 260(1) of the B.P.M.C. Act on 7.10.1996. It is clear from the record that the construction was carried out and completed without the plans being approved and without the approval of the plans, the persons were put in possession. It was also prayed to remove unauthorised construction. M/s. Nita International prayed for removal of illegal construction.

##. When the facts are placed before the Court pointing out unauthorised construction contrary to the provisions of the B.P.M.C. Act, building regulations etc., the same should not be continued to be in existence. Sufficient evidence was produced on record indicating that the construction was illegal and unauthorised. Therefore, the deponent instead of blaming others should blame himself. The deponent in his affidavit has raised contention with regard to the applicability of the Gujarat Town Planning and Urban Development Act, 1976 and that the permission under the B.P.M.C. Act is not required. The petitioner raised further contention which the Court has considered in the Special Civil Application No.10899 of 2000 filed by the builder which has been rejected and therefore the Court need not consider the same in detail. The deponent has referred to General Development Control Regulations and particularly, regulation 12.9(3)(i)(xii) which requires 5% of the total built up area for common amenities and for a watchman quarter not exceeding 50 sq.mtrs (60 sq.yards). The deponent contended that the provisions for compulsory providing 5% area for common amenities is ultra vires. All these submissions have been considered by the Court in Special Civil Application No. 10899 of 2000 filed by the present builder. The Court has held that the requirement of keeping 5% of FSI reserved for common amenities and for watchman quarter to look after the building and the occupiers cannot be said to be inconsistent with the provisions made in the Gujarat Town Planning and Development Act. It is also held that the scheme has become final after it received sanction from the Government and became part & parcel of the Act itself. Considering the various judgements of the Apex Court and the High Court of Gujarat, the contentions have been rejected and therefore it is required to be rejected in the present petition.

##. The learned Advocate appearing for the Ahmedabad Municipal Corporation submitted that the plans were approved for only residential purpose. He further submitted that, (i) the shops constructed in the cellar were in violation of the provisions contained in the building by-laws, regulations, etc., (ii) shops on the ground floor bearing Nos. 28, 29, 30, 31, 44, 45, 46 and 48 were never indicated in the original plans, and were not constructed not in accordance with the building by-laws, regulations and the plans submitted before the Corporation and approved by the Corporation, and, (iii) construction of 9th floor is in violation of building regulations. 9th floor was not shown in the plan and

maximum permissible height having reached at 8th floor, 9th floor could never have been permitted by the Corporation. The developers/builders erected shops contrary to the provisions of law and by concealing these facts, transferred the shops as if they were erected in accordance with the approved plan and in accordance with law.

##. Mr.Bhatt, Learned Counsel appearing for the builder submitted that the claim is vague and cannot be entertained by this Court. He further submitted that the brochure published by the builder is only an advertisement of the proposed project. According to him it was nothing but an invitation to offer as contemplated in the Indian Contract Act. According to him, the written contract is in the form of possession receipt which is produced on the record and the reliance is placed on the said receipts. Shri Upendra Shah has filed an affidavit wherein in Para 6 he has stated that it is not true that the members were kept in the dark regarding the plans sanctioned by Ahmedabad Municipal Corporation. Shri Upendra Shah has denied that the representation was made by him that the premises are meant for commercial purpose and the averments made by Shri Hasmukh Shah in his affidavit are true. It is required to be noted at this juncture that Shri Hasmukh Shah in his affidavit in Para 3 has stated that "the said complex consists of 3 residential towers and 1 commercial complex". Therefore, it is clear that there was representation to the persons who purchased the property from this builder that the tower in question is a commercial complex and it is in view of this representation the members have purchased the property for their office purposes which is made clear in the affidavit on behalf of the association by Shri Ilyias Chataiwala.

##. In Para 16, the builder has come out with a case that the regulation for making provisions of common amenities and parking are ultra vires. Was he not aware when he submitted the plans for erection of the building? Why he did not challenge at the same time? This contention which he raised separately has been negatived by the Court for which we have made reference earlier. In Para 28 of the affidavit, the builder has come out with a case that if the premises allotted is found unauthorised and if the petitioners claim any compensation, they must hand over the possession of the property to these respondents, i.e. builders. Today the occupiers are not in possession. When the affidavit was filed they were not in possession and it seems that just for the sake of raising grounds, the averments are made

in the affidavit. It is stated that the subject matter of the petition is only unauthorised construction with reference to the B.P.M.C. Act and Town Planning act and the dispute regarding title of the property cannot be the subject matter of this petition and the possession must revert back to these respondents, i.e. the builders. It is required to be stated that the builder is not the owner of the property in question. The plans were submitted by the owner of the plot i.e. M/s. Amichand Park Co-operative Housing Society Ltd. which is clear from the plans. Only the owner of the property in question can transfer the property. It is not the case of the builder that the builder was authorised by Amichand Park Co.op. Housing Society Limited to erect the shop in question unauthorisedly and was also authorised to transfer on behalf of Amichand Park Co.op. Society. The builder cannot have a better title then Amichand Park Co.op. Society. If the society itself was not permitted to construct the shops as per the plans, the builder certainly could not carry out the construction in violation of the building regulations and cannot dispose of the shops. So far as Nita International is concerned, on behalf of the builder, it is stated that Nita International is trying to convert the proceedings of a writ petition into a civil suit by not only claiming refund of purchase price but by making exaggerated claim of damages. It is stated that the claim of damages having been made by the petitioner is clearly outside the scope of writ jurisdiction. His claim requires leading of evidence, proof of documentary evidence and an opportunity to these respondents to cross-examine the witnesses. It is further pointed out that the claim is not restricted to refund of the purchase price. It is further pointed out in the affidavit by the builder that Nita International itself is a wrong-doer since it had put up substantial unauthorised construction and thereafter was using the part of the building unauthorisedly. It is also further pointed out that even while examining the claim of refund of the purchase price, it is necessary to take into consideration the use made by the petitioners for all these years. On behalf of the builder, reliance is placed on clause 25 which restricts the use of a building for restaurant or hotel and for such other purpose which may be harmful to the Association or other occupiers of the shops/flats in the said building. Even with regard to the terrace, it is indicated that the purchaser shall not put up any structure in the open terrace. For putting up neon signs or boards, prior permission of the builder was required. It was therefore submitted that the claim of Nita International is highly exaggerated,

whether the amount was spent or not is a subject matter of evidence. Even while examining the claim of refund of the purchase price on behalf of the builders, it is stated that it is necessary to take into consideration use made by the occupier for all these years.

##. On behalf of both the sides, details were placed on record in tabular form etc., i.e. the statement indicating the details of purchase price, present valuation, good-will amount etc.

##. On behalf of the Builder, dispute is raised about the present market value, good will or the present valuation of the property of the same size in the vicinity. One thing is certain: the acceptance of purchase amount is not disputed by the builder.

##. It was contended by the builder that the place meant for parking and common amenities does not provide title, therefore, the question is to whom it should go back and whether the possession should be restored to the builder or that it should be restored to the society? It was contended that except the builder, none has a right to use the space meant for parking and for common amenities.

##. It is required to be noted that one partner of the builder, namely, Upendra C. Shah, has signed the plans as an owner for the Society. Thus, it is he who knew that the society is the owner and not the builder/developer, and, therefore, the possession must be restored to the owner of the building in question, namely, the society and not the builder/developer. The builder was merely a developer and was required to develop the property in accordance with law and not at his sweet will or as per his whims and caprice. No document showing right, title or interest in the property has been placed before this Court either by the builder firm or its partner. Merely because he was the signatory to the document for the disposal of the shops, he cannot claim right as an owner of the space meant for parking and common amenities. The Building Law requires that the owner must erect a building in accordance with the plans approved and the developer was, thus, duty bound to erect a building as per the plans approved and therefore, we find no substance in the contention raised by the builder that right and title with regard to the space meant for parking and common amenities vested in him and it should be restored to him.

##. Earlier, the Division Bench passed orders in the petition filed by Nita International (Spl.C.A.

No.8553/2000 on 24.8.2000) and also in AO No. 441/1998 (decided on 6.9.2000), considering the decisions rendered by this High Court in the case MANUBHAI ISHWARLAL vs. SURAT MUNICIPAL CORPORATION reported in 1996 (3) GLR 1 -wherein a Division Bench held that intimation is a must by the owner on completion and one cannot occupy the premises without prior permission of the Municipal Commissioner-, and in the case of YOGESH D SHETH vs. AHMEDABAD MUNICIPAL CORPORATION reported in 1996 (3) GLR 416 -wherein the Court pointed out regarding the shops constructed in parking place contrary to the byelaws of the Corporation and the approved plan and in the case of EMPIRE CONSTRUCTION & HOTEL CO. LTD. vs. AHMEDABAD MUNICIPAL CORPORATION reported in 1995 (2) GLR 1293 -wherein the Court considered the question of unauthorised constructions. The Court in the above matters also considered the case of DR. G.N. KHAJURIA vs. DELHI DEVELOPMENT AUTHORITY reported in (1995) 5 SCC 762. The decision of the Division Bench delivered on 24.8.2000 wherein it was held that the construction was illegal and unauthorised was challenged by way of preferring a Special Leave Petition before the Apex Court, which was ultimately rejected by the Apex Court. Thus the finding with regard to the unauthorised construction insofar as the building is concerned, is final.

##. The Court, in Appeal from Order No. 441 of 1998 where parking place was not provided though indicated in the plans, after considering provisions for parking, in paragraph 27 of the judgment, held that it is bounden duty of the owner to provide parking. In paragraph 30 of the judgment in the aforesaid case, the Court observed:

"So far as the parking arrangement is concerned, strict compliance is absolutely necessary. In the year 1997, with the Regional Transport Office, Ahmedabad, 9,18,589 vehicles were registered till July 1997. Thereafter number of vehicles must have been registered and approximately 12 lakhs vehicles are registered with the RTO. Considering the population of the Ahmedabad for every four persons, there is one vehicle. Obviously that would require sufficient place for parking also. Over and above these vehicles, there are thousands of visitors to the city every day who are coming in their own vehicles or by hired vehicles. Number of transport buses, regularly operate in city by Ahmedabad Municipal Corporation not only within the city limits but within larger area covered

> under Development Act. Approximately 50,000 autorickshaws are operating providing quick transport service. Transport buses are operated by private transporters from various parts in the city. Over and above this, State Road Transport Corporation operates buses from congested area of the city which are passing through various roads of the city. Their frequency/trips have also increased. All these aspects were required to be taken into consideration. Looking to the fast development and need of the people vehicles are increasing every day in the city. In view of expansion of city, and considering distance and time use of vehicles has increased a lot. On account of blessings of the concerned department, even some residential buildings are permitted to be used as office complexes without prior approval, without providing parking. Office complex is occupied by many people and the premises are to be visited by number of people which would lead to abnormal movement of traffic and that really causes the problems for the residents of Ahmedabad. Neither police is able to manage nor the Corporation is able to manage in this regard".

##. Article 21 of the Constitution must be strictly enforced. Local government is bound to see that the life of the persons residing in the city is made meaningful, complete and worth living.

##. People in search of work, move to urban agglomeration. All amenities and living conveniences also attract people to move from rural areas to cities. Industry is equally responsible for concentration of population around the industries. It is the responsibility of the local government to see that the people who are coming to the cities are under the law compelled to have accommodation in such a way that it may not affect adversely the life and liberty of other citizens. It appears that keeping this aspect in mind, the Development Act as well as the provisions contained in the Corporation Act are required to be strictly implemented. Right to decent environment and smoke free and pollution free environment follows from the quality of life which is guaranteed by Art. 21 of the Constitution. The Rules are made with a view to see that proper parking facilities are provided and roads are sufficiently widened to see that on account of increase in number of vehicles, people moving on their own from one place to another place are not adversely affected.

##. On account of requisite parking being not provided, the roads are being congested on account of bottle-necking, and the people suffer a lot. That would affect their health and would create several problems. On account of absence of parking, the people park their vehicles on the roads and footpath, as a result of which, common man finds it very difficult for moving from one place to another place. This causes not only inconvenience but causes health hazards and in our view, the action not taken by the officers to avoid such a situation would not only require to be condemned but action should be taken by the Corporation.

##. It is required to be noted that said Hasmukh Shah has referred notices having been issued by the Corporation u/S. 268 of the BPMC Act in respect of irregularities regarding change of use only. It may be noted that even according to the deponent no notice was issued for illegal construction and the irregularity which is alleged in para. 6 of the affidavit is with regard to change of user only and not with regard to unauthorised construction or construction in violation of building regulations/bye-laws. It is further contended that the occupants having acquiesced in not taking steps in the year 1989-90, they have no right to make any grievance against builder for the alleged non-compliance.

##. It is required to be noted that if there is a question of change of user, the question may be required to be considered in different perspective. But in the instant case as it is found that there was unauthorised construction and it is not the case of builder that at any point of time prior to the present proceedings all occupants were made aware about unauthorised construction, the question suggested by him does not arise. In para. 8 of the affidavit it is stated by Mr. Hasmukh Shah that the final plot no. 673/2 of the T.P. Scheme no. 3 Ahmedabad is owned by Amichand Park Cooperative Housing Society Ltd. Thus owner of the plots in question where the towers have been constructed belong to Amichand Park Cooperative Housing Society Ltd., is a known fact to the builder. Use of F.S.I. or availability of F.S.I. is of no consequence in this matter.

##. Mr. Hasmukh Shah has stated that the part of the area which was shown as parking area is used as shop. The area is very meagre. He has stated that "without prejudice to the rights and contentions regarding such alleged use subject to the provisions of law, it is most

respectfully submitted that the builder is ready and willing to provide such deficit area as well as common amenities area from the available FSI on the same plot of land. If such permission is granted, the shops in the parking area as well as the shops located in the common amenities area would thereafter be stand regularised. At this stage, I would like to clarify that common amenities area is included in the used FSI and if used for other purpose, if any, would only amount to change of use and would not be subject to demolition."

##. The words 'change of use' or 'change of user' are clear in the meaning they are conveying. When a premises constructed for residence as per approved plans is put to a different use without any change in construction, namely, office, there will be change of use simpliciter, as understood. If there is alteration in the design, additional construction or addition or alteration in original design, such alteration or addition would be unauthorised and would not be permissible for any use as no permission is obtained. It will amount to not only change of use but also to erect a building as mentioned in section 253 of the BPMC Act. However, at the time of erection of building or even part of a building is not erected as per approved plans, it amounts to unauthorised construction. If there is a desire to convert the part of a building or the Building into a stall, shop, warehouse, godown or office not originally constructed for the use as such, and for such conversion, if changes are made then it would be considered as erection of a building as provided in sections 253 and 254 of BPMC Act. Thus, the question involved is of unauthorised construction. So far as entire tower (except 9th floor and shops in question) is concerned, as the erection is as per plan, but builder passed on the property to others specifically stating as office complex, the persons were using as office premises and on realising the consequences they put the property to residential use. No orders were passed with regard to that part of the building by the Division Bench. That was the change of user.

##. With regard to 9th floor, Mr. Hasmukh Shah has stated in para. 10 that "without prejudice to the rights and contentions which may be canvassed at the time of hearing of the petition, I most humbly and respectfully submit that without prejudice to the right of further appeal and subject to the final order of the Apex Court, the Builder is ready and willing to refund the cost of the premises received from the allottee. I further say that as per the new regulations, which are proposed

before the State Government it may be possible that this structure can also be regularised in view of the permission for higher height." It is contended by him that to award compensation without going into the details of evidence, it would be premature decision and that too without a trial. It is further contended in the affidavit that allottees acquired the premises only for the purpose of investment and having usufructs fruits of the same either by way of rent or by way of using the premises for their own purpose can not claim any compensation. In such an eventuality, it would not be fair to burden the builder after lapse of 11 years. It is further averred that during the interregnum period some of the allottees have taken the advantage of price escalation.

##. Alongwith the affidavit xerox copy of the documents are placed on record. The brochure / agreement refers to builder, contractor and architect. In the agreement the builder M/s. Hasmukh Shah, a Partnership firm has shown itself as "the Builders" and sellers. There is a reference to the agreement for sale dated 5/11/1980 and the agreement dated 15/1/1981 between the association and the Builder. Copies of the documents are not placed on record. Therefore, it would not be proper to place reliance on statements which are found in the agreement. In clause 3 it is specifically mentioned that the Builders have been given absolute authority and power to enroll members, to construct building and to allot shops/flats in the said building on such payment as may be agreed upon from time to time and to do all things and acts necessary and expedient in connection therewith for and on behalf of the association. In clause 5 it is mentioned that the Builders have prepared plans for construction of building consisting of ground floor and upper storeys. In clause 6 it is mentioned that the Builders have already prepared plans of the said building for sanction of the Municipal Corporation of Ahmedabad. In clause 9 it is mentioned that the Builder with the intention of developing the said property has arranged to start construction on the said property to be named "CENTRE POINT" in accordance with the plans prepared by M/s. Hasmukh C. Patel, Architects of Ahmedabad and the said plans and specifications which have been sanctioned and approved by the purchasers. In the agreement it is further provided as under :-

"(1) The Builders will construct a building in accordance with the building plans prepared by M/s. Hasmukh C. Patel Architects of Ahmedabad, on the said

property more particularly described in the First Schedule hereunder written. It is agreed between the parties that the Builders will be entitled to make changes and variations in the said building plans as required by the Municipal Corporation of Ahmedabad and which the Builders may deem fit and appropriate and the Purchaser hereby irrevocably consents to the Builders carrying out such changes."

##. There is a reference that the purchaser was shown the building plans and specifications. In the agreement there is reference to the amount paid. It appears that the sum of Rs.1,46,000/- was paid as purchase price in respect of one shop no. 44 on the upper level floor admeasuring 200 sq. ft. carpet area in the said building. Even in the document there is no reference to plans approved by Corporation having been shown to the occupiers. Changes in the plans were at the discretion of the builder. It is nowhere stated that after changes made in the plans, the same were shown to the buyers and they agreed for the same. The Builder agreed to handover possession in July, 1989. There is no reference that the same will be handed over after B.U. permission is granted. The Builder agreed to give possession of the aforesaid shop on or before 31st day of July 1989 subject to availability of cement, iron, water for construction and other building materials, etc. The buyer was told by the Builder that the terrace shall always belong to the Builder and in the event of the Builder obtaining permission from the Corporation or from the Competent Authority for additional construction, the Builder shall be entitled to make such additional construction and shall be entitled to dispose of such additional construction. The Builder shall have right to run a restaurant or hotel on the terrace of the said building or let or sell it for use as restaurant. The association of the shops/flats that may be formed by the purchasers of the property shall admit and allow the Builder or other persons to go to the terrace of the said building. Clause 31 reads as under :-

"31. After the building is complete and ready and fit for occupation and after the Association as aforesaid is registered and only after all the Shops/Flats in the said building have been sold and disposed of by the Builders and the Builders have referred all dues payable to them under

the terms of the agreement with various purchasers of Shops/Flats in the said Building, the Builders shall obtain necessary Conveyance of the said property directly in favour of Association from the original owners."

##. The agreement is signed by Upendra C. Shah at two places - at the bottom of the document in the name of Upendra C. Shah as partner and at other place for M/s. Hasmukh Shah as partner. The document appears to have been signed by the person in whose favour it was executed.

##. It was obligatory for the builder to get the conveyance deed in favour of purchaser after the building is fit for occupation and amount of consideration in full is received. The builder has not produced any conveyance deed executed by the owner of the plot.

##. So far as the possession receipt is concerned, it is very interesting to note that the sub-clause (D) of clause 1 reads as under :-

"The builders are constructing the building as per the plans sanctioned by the Municipal Corporation and as per the specifications suggested by the owners. The construction of our booked flat/shopping is now complete. The office complex in lieu of original residential building no. 1 is in progress. So far the undersigned is concerned, possession of flat/shop/office no. 44 is handed over to the undersigned by the builders on 1/8/90."

Clause (xvii) reads as under :-

"It is agreed that the construction (of) office complex in live (lieu) of original building No.1 is in progress and I/We shall have no any right, title or the interest in respect of the above extra construction and I/We shall not obstruct the builder to carry out such further construction."

The clause (xix) of the printed receipt form reads as under :-

"The entire project including of office complex is not yet complete and the building use permission is not obtained still the builders have handed over the possession of the premises booked by me at my request and at my risk and responsibilities and on my undertaking and assurance that if any notice or proceeding shall arise by any authority including Municipal Corporation for use and occupation, I/We shall alone be liable and/or answerable for the same and neither the builders nor the association and/or its office bearers will be liable or answerable for the same."

##. It appears that the document is signed on 1/8/1990. Possession was handed over soon after the construction without waiting for approval of the plans or B.U. permission. The representation made to the effect that the builder was constructing the building as per plans sanctioned by the Corporation is a false statement. The representation could not have been made by the builder on 1/8/1990 as the plans were not sanctioned on or before that date. It is nowhere pleaded by the builder that plans were sanctioned prior to 1/8/1990. Before the Court sanctioned plans signed by Amichand Park Co-Op. Housing Society Limited were produced for perusal from which it is clear that the plans were sanctioned on 12.8.1992, vide Rajachitti No. 28. Despite repeatedly asked by the Court the builder has not produced the plans shown to the buyers. From the documents it is very clear that a false representation was made that the builder was constructing building as per sanctioned plans though the facts were within his knowledge that the plans were not sanctioned.

##. It was submitted on behalf of the builder that the B.P.M.C. Act does not confer any title to any person. It was further submitted that the petition is filed for violation of provisions contained in the BPMC Act and not for any breach of the provisions contained in the Transfer of Property Act. It was submitted that such rights cannot be decided in a petition filed for breach of the provisions of the BPMC Act. It is required to be noted that it is not contended by the original petitioners, i.e. occupiers, that the rights and titles have been conferred on them. Their say is that it is the builder who executed the documents and put them in possession of the shops and office complex constructed contrary to the Building Regulations. The builder does not become the owner of the space in question. It was

further contended that some of the occupiers have transferred the shops and the persons who are put in possession have no right to claim amount. It is required to be noted that it is the builder who has put the persons in occupation of the property and the persons, who put others in occupation of the property, would not lose their right and they would stand in the shoes of the erstwhile owners and will be entitled to claim the amount.

##. It was contended before the Court that the plans were submitted before the Corporation somewhere in the year 1983. The shopkeepers and others entered into agreements in or around July-1989 or thereafter. They were put in possession in the year 1990. The revised plans were also placed before the Corporation much earlier. However, without the revised plans being sanctioned, the construction was carried out and it seems that in the year 1996, notices under section-260(1) and (2) of the Act were issued on the basis of the plans which were sanctioned in 1992. The building is neither constructed as per the plans originally produced in 1983 before the Corporation nor as per the plans approved subsequently in 1992 by the Corporation. It is not the case of the builder that erection of shops in question was in conformity with the plans produced before the Corporation in the year 1983 and subsequently, plans were submitted with the consent of the occupiers in question. Thus, the builder/developer, who was in management of the society at the relevant time, left the occupiers at the mercy of the Almighty God after collecting money from them.

##. The owner of the property could have transferred the rights in the property and the builder has not produced anything on the record authorising him to transfer the shops. Such a document should have been placed on record by the builder from his custody, but, has not been produced and in absence of such document, it is difficult to accept his contention that the builder was authorised to dispose of the shops at his sweet will. It is required to be noted that before the Court, no shopkeeper has produced share certificate issued by the society to substantiate his claim that he was the member of the society.

##. It is this builder who knew very well that the land belongs to the Cooperative society and it is this builder who has signed the plans in the capacity of Chairman/Secretary of the Society. On behalf of the builder, it was submitted that it was for the occupier to

take appropriate care before buying the property. It is required to be noted that the person who is out to dispose of the property has to disclose the true character of the property and if he suppresses any material, he is not entitled to say that the buyer should have enquired. It is a builder who put in circulation a booklet, a brochure or other literature i.e. the plans, etc., and it is his brochure in writing which was accepted by others. Even reading the clauses of the agreement which we have discussed earlier, it is clear that it is nowhere revealed that he has shown the plans which were approved by the Corporation, but has stated that merely, plans were shown. The learned counsel for the builder submitted that in view of section-19A of the Indian Contract Act, 1872, if there is undue influence, then, the agreement which is a contract, is voidable at the option of the party whose consent was so obtained. It was further submitted that in view of section-65 of the Indian Contract Act, 1872, when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. It was submitted that in view of this provision, it is clear that it is a matter of contract and the party must be relegated to the Civil Court.

##. When before the Court, it is very clear that the builder has put the occupiers in possession of the property which he was not authorised to construct, then, after lengthy hearing, to ask the occupiers to approach other forum would amount to waste of time of the Court and would cause injustice to the persons who are the sufferers. Ordinarily, the Court which decides the issue about the construction whether it is in accordance with law or not would be the proper Court which can decide to pay the just compensation or at least the principal amount paid by the person with interest or the present market value and can award compensation at the rate which is prevailing in the market at the time of deciding the matter. The occupiers put faith in the builder and after a decade, it is found that they were duped and the shops have been demolished by the Corporation after the Court arrived at a conclusion that the construction was unauthorised, it would be improper to ask the occupiers to approach other forum when the Court itself has sufficient material with it to arrive at a just conclusion. If the Court is deciding the matter with regard to the damages, the matter would be different, but, if the Division Bench of this Court earlier recorded a finding that the construction was illegal and before

this Court it is established that the builder has received amount from the occupiers for such construction, then, the Court would be justified in awarding just compensation.

##. It is required to be noted that when there is great delay in deciding the matters and when the Court is in a position to decide the fact that part of the building so erected was unauthorised, then, in that case, it is not necessary to ask the occupiers to go to the Civil Court for their just claim. It is the obligation of the person who has received the amount to return the same. The person who has received the amount for illegal construction must repay with interest or he should repay the cost prevailing today in the market for the property of similar size which was given by the builder and that the occupier would require to purchase.

##. There is nothing to show that builder/developer ever communicated about unauthorised construction to any of the shopkeeper. Thus, all shopkeepers were not aware about the same and the builder/developer has not produced any evidence indicating that he conveyed that construction is illegal. No material is placed to show that owner of shop no.4 was aware about illegal construction. Hence, there is no substance in the submission.

##. What is required to be borne in mind is that the builder/developer was neither the owner of the plot/land nor was authorised by the society, the owner, to erect a building in contravention of Building Regulations and to induct the shopkeepers. The Builder/Developer in absence of any documentary evidence in his favour executed by the society authorising him to transfer the rights in favour of shopkeepers has no case. The Builder/Developer erected Building contrary to the plans approved subsequently and did not make changes so as to resemble as the construction carried out as per plans sanctioned. The builder-developer has accepted the plans approved/sanctioned by the Corporation. The Builder/Developer has not taken consent of shopkeepers in making changes or has not subsequently informed them and has not paid the amount back to the shopkeepers. As per the agreement which is reproduced in affidavit by Mr. Hashmukh Shah, the builder was entitled to change the plan as to make variation in the Building Plan as required by the Corporation and purchasers irrevocably consented to carry out such changes. As per the plans, though he was required to make changes had not made changes in the construction. Why? Immediately demand

would have been made for return of the amount. This was not acceptable to the builder and hence, did not inform the shopkeepers about approval of the plans and did not carry out changes. The Builder/developer knew that the construction is unauthorised and it was his duty to return the amount. Thus, the facts are established that builder/developer collected money from shopkeepers knowing full well that construction was unauthorised and did not return the amount. When these facts are established, the question to be decided by the Court is what should be the just compensation. If damages are claimed , claiming under various heads, which can be decided only after a trial, this Court may not entertain such claim. So far as just compensation is concerned, on the basis of amount received, with interest or present market value, it would be just and proper to direct the builder/developer to pay just compensation.

##. On behalf of the builder, it was submitted that so far as Shop No. 4 is concerned, it was purchased in the year of 1995 subsequent to the notice. The person who occupied the shop originally, knowing fully well that it is illegal, ought not to have transferred the shop or ought to have disclosed about the illegal construction.

##. The Association has filed an Affidavit and has placed on record the fact that the occupiers came to know that the construction was not permissible or in the space meant for parking and common amenities shops were constructed only during the hearing of the Special Civil Applications. Even, 9th floor was erected without permission of the Corporation and contrary to the provisions of law and therefore, they submitted that it is not correct to say that it was known to even the original occupier of Shop No. 4 that it was an unauthorised construction.

##. It was submitted on behalf of the builder, that the law of limitation applies to the proceedings and therefore, within a period of 3 years, action ought to have been taken. It is required to be noted that till Division Bench of this Court decided the matter on 24.8.2000, it was not known to the occupiers that the construction is unauthorised, illegal and contrary to the provisions of law and that the construction is carried out in the parking and the space meant for common amenities. The builder has not placed any material on record that these facts were within the knowledge of the occupiers, but, on the contrary, he has come out with a case that this space meant for common amenities and parking is contrary to the provisions of law and

suggestion of the builder is that he was justified in erecting the shops. The period prescribed in the law of limitation will begin to run only when the occupiers came to know that the construction was unauthorised and when the Division Bench of this Court held that the construction was unauthorised. Therefore, there is no merit in the submission.

##. It was submitted that when a right flows from a contract, then, the Court is not entitled to pass any order under Article-226 of the Constitution of India. On behalf of the builder, it was submitted that ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if the contract is capable of being specifically performed or the party may sue for the damages; such a suit would ordinarily be tried by the Civil Court. A right to relief flowing from a contract has to be claimed in a Civil Court where a suit for specific performance of contract or for damages could be filed. Reliance was placed on the decision of the Apex Court in the case of the DIVISIONAL FOREST OFFICER V. BISHWANATH TEA CO. LTD., reported in AIR 1981 SC 1368. In that case the Company tried to enforce through a writ petition the right to remove timber without the liability to pay royalty. It was held that the Company was not enforcing its right under rule-37 of the Assam Land and Revenue and Local Rates Regulation, but was seeking to enforce a contractual right under the specific terms of the contract of lease agreed to between the Company and the Government.

##. On behalf of the builder, it was submitted that in case of GANDHI R. LINES VS. COLLECTOR OF BANASKANTHA, reported at 1999 (4) GCD 2627, the Division Bench of this Court has taken a view that on broad principles, it must be noted that application under Article-226 of the Constitution of India is not maintainable for enforcement or breach of contractual rights against a party to the contract irrespective of the fact that whether such a party is private individual or the State because such dispute involves questions of facts which can be investigated in a suit rather than in the writ proceedings. In that case, the appellant was required to lift sugar from the factory situated within the State of Gujarat or from any other place or from the godown and it was required to supply at various shops and/or godowns of Nominee. The appellant was also required to see that the quota of sugar allocated is not lapsed. Condition no.2 of the contract provided for a dispute with regard to the charges to be paid considering the distance and that the

decision of the Collector shall be final. Condition No.6 of the contract fastened the appellant with liability if damages were suffered by the Nominee. The appellant, if not, transporting sugar as agreed, then, the nominee was required to purchase sugar from open market and was required to get it transported, and the appellant was liable to pay entire amount with costs. Condition No.13 provided for forfeiture of the amount deposited either in part or in full. The Collector has, as per the Condition no.13 of the contract, forfeited the amount. It was submitted before the Court that the charges only were required to be recovered from him and it was not proper for the Collector to forfeit the entire amount of Rs.1 lakh. The Court in para-17 pointed out that :

"17. It is required to be noted that in every case of breach of contract, the person aggrieved by the breach is not required to prove the actual loss or damage suffered by him before he can claim the amount and the Court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of breach of contract. In cases of breach of some contract, it may be impossible for the Court to assess the compensation arising first from the breach, while in other cases, compensation can be calculated in accordance with the established rules. Where the Court is unable to assess the compensation the sum named by the parties, if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty."

##. The Court pointed out that the nominee was not made a party to the proceedings who entered into an agreement with the appellant. The sum of Rs.1 lac was deposited for due performance of the contract. It was not only towards carting charges or the loss which might have been suffered. It was with a view to see that there is proper distribution and that too, of levy sugar, the amount was got deposited with a right to forfeit in case of breach of contract. It is in this background that the matter was left to the discretion of the Collector to decide. It was submitted that the Court should not issue writ to compel the person to remedy a breach of contract pure and simple. It is required to be noted that this is not a matter of pure and simple breach of contract. It is not the case that after entering into an agreement, the occupiers were not put in possession and therefore, the

claim was made, but, it is the case where unauthorised construction contrary to the regulations was carried out about which occupiers were never informed that erection of the building is not as per plans approved. It is in view of the breach of the Building Regulations and illegal constructions in violation of the provisions made in the relevant law, innocent persons suffered and not because of the breach of the contract and therefore, there is no substance in the argument.

##. In the instant case, had it not been brought to the notice of the Court by one of the petitioners that the construction is illegal, contrary to the building by-laws and without approval of the plans, none would have come to know about the same. Under the Statute, when the Corporation has to play a very important role in permitting the parties to erect a building and after the party erecting a building or a builder after erecting a building, inducts others in the property by unauthorised construction, the situation stands on a different footing altogether. It may be in view of the sweet will of the Officers of the Corporation, after approval of the plans, they might not have visited the building or even before approval of the plans, they might not have visited the building and the plans might have been approved.

##. However, as per Building Regulations soon after the commencement of the work of erection of a building as per stages indicated in the rules, the builder/developer was required to inform the Corporation about completion of each stage of work. As per the rules, the officers of the Corporation were expected to visit the site of the building at every stage. After approval or deemed approval of the stage further work was to be carried out. After completion of erection of a building notice under section 263 of the BPMC Act was required to be given by the person erecting the building (in the instant case, developer/builder). It is only after this notice, question of building use permission will arise. It is the duty of the builder/developer not to permit any one to occupy the building till Building Use Permission is granted. In the instant case, in violation of the Building Regulations, building was erected, persons were put in possession and the Corporation provided essential services. (It was the duty of officers of Corporation looking after the work of erection of building, etc., to see that no unauthorised erection work commences and if commenced to stop the same under the provisions of the B.P.M.C.. Act). The building in question came to be erected in a centrally located area of Ellisbridge. It is not the case of the officers of the Corporation that

without their knowledge, building came to be erected. The builder has not placed any thing on record to show that stagewise (in the present case, cellar, ground floor and upto 9th floor), Corporation was informed about the completion of each stage. Had the officers of the Corporation visited as per the stages or at the time of approval of plans, illegalities could have been detected. When huge construction activities were being carried out it was the duty of the officers of the Corporation to visit the site and to prevent the use of such unauthorised construction and ought not to have provided essential services.

##. In the present case, the Building laws were required to be strictly followed. Officers of the Corporation were expected to be vigilant. Mere look at the provisions would show that the Officers were authorised to stop the erection and could have posted guards to see that activities are not carried out unless and until plans are approved and construction is as per plans. (During this session of hearing in some cases, we have noticed that the Corporation posted security guards to see that no activities of construction are carried on or buildings are not occupied). As and when officers of the Corporation thought it proper, they have exercised the powers. Even building construction with some variations were sealed so as to see that the same are not occupied. Thus, for one or the other reason, the building in question came to be erected contrary to regulations, and without Building Use permission has allowed to put to use after providing essential services.

##. On behalf of the builder, it was submitted that only the Apex Court under Article-32 of the Constitution has awarded compensation who suffered personal injuries at the hands of the Officers of the Government and causing of the injuries which amounted to tortuous act. Learned Advocate for the builder submitted that the High Court under Article-226 cannot pass any order with regard to compensation.

##. The Apex Court in case of INDRA SAWHNEY vs. UNION OF INDIA reported in (1992) SUPP. 3 SCC 217 para 302) has pointed out that :-

" ... the requirement of efficiency is overriding mandate of the Constitution. An inefficient administration betrays the present as well as future of the Nation. ... "

An inefficient administration is harmful to the

society. The persons in charge of administration on account of their inefficiency would cause considerable damage to the society, national interests, and image of the Nation. Therefore, if the person who is in charge is not acting in accordance with law and by neglecting his lawful duties, allows others to act in contravention of the provisions of law, he is like a deadwood. Despite the plans submitted, the authorities of the local government has not bothered whether building erected is in accordance with law or not. How they provided essential services? The construction of shops and the 9th floor of the building were in total breach of all the laws and yet, no action is taken by the Ahmedabad Municipal Corporation. Municipal Commissioner and the officers of the Town Development Department have not bothered to carry out their obligation under the laws.

##. It is required to be noted that the Apex Court in the case of COMMON CAUSE, A REGISTERED SOCIETY v. UNION OF INDIA, reported at 1999 (6) SCC 667, in para-39, 40 and 41 has pointed out as under :

39. Under Article 226 of the Constitution, the High Court has been given the power and jurisdiction to issue appropriate writs in the nature of mandamus, certiorari, prohibition, quo warranto and habeas corpus for the enforcement of fundamental rights or for any other purpose. Thus, the High Court has jurisdiction not only to grant relief for the enforcement of fundamental rights but also for "any other purpose" which would include the enforcement of public duties by public bodies. So also, the Supreme Court under Article-32 has the jurisdiction to issue prerogative writs for the enforcement of fundamental rights guaranteed to a citizen under the Constitution.

40. Essentially, under public law, it is the dispute between the citizen or a group of citizens on the one hand and the State or other public bodies on the other, which is resolved. This is done to maintain the rule of law and to prevent the State or the public bodies from acting in an arbitrary manner or in violation of that rule. The exercise of constitutional powers by the High Court and the Supreme Court under Articles 226 and 32 has been categorised as power of "judicial review". Every executive or administrative action of the State or other statutory or public bodies is open to judicial

scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of fundamental rights guaranteed by the Constitution. With the expanding horizon of Article 14 read with other articles dealing with fundamental rights, every executive action of the Government or other public bodies, including instrumentalities of the Government, or those which can be legally treated as "Authority" within the meaning of Article 12, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of this Court under Article 32 or the High Court under Article 226 and can be validly scrutinised on the touchstone of the constitutional mandates.

41. In a broad sense, therefore, it may be said that those branches of law which deal with the rights/duties and privileges of the public authorities and their relationship with the individual citizens of the State pertain to "public law", such as constitutional and administrative law, in contradistinction to "Private law" fields which are those branches of law which deal with the rights and liabilities of private individuals in relation to one another."

##. It is very clear that in the instant case, it was a duty of the public authority to see that the building is erected in accordance with the Building Regulations and no unauthorised construction is carried out of whatsoever nature. It is in view of the breach committed by these authorities, the occupiers are required to suffer. It was equally the duty of the builder/developer to follow the provisions contained in the various Acts and Regulations or Building By-laws and on account of negligence or connivance of the public officers, the builder has successfully permitted others to occupy the unauthorised construction. It is not merely individual dispute or it is not merely dispute between the builder and the occupier. The Court while examining the actions of the public Officer pertaining to the public law domain, made an order. The innocent shopkeepers are the sufferers. The Court pointed out in para-42 in the case of COMMON CAUSE, (supra) that the distinction between private law and public law as noticed by the Apex Court in LIC OF INDIA V. ESCORTS LIMITED, reported in 1986 (1) SCC 264 wherein the Court observed as under :

"The difficulty will lie in demarcating the frontier between the public law domain and the private law filed. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances".

##. An individual (group of persons, firm, etc.) is required to carry out the work of erection of a building for occupation of others and only competent persons, duly qualified, authorised and registered with public authorities under the law, or rules, or regulations are permitted to erect a building under direct supervision and control of the authority. It is found that not only the builder, but an engineer, an architect, a clerk of works duly qualified, authorised and registered for the purpose of erection of a building erected a building in contravention of the provisions of laws and Rules and Regulations. The act of such persons coupled with the act of the authority supervising/controlling the work is required to be considered as answerable stage wise. After inspection, on finding that work is contrary to provision, if action was taken, matter would be different. Even while approving the plans, on visit to the site if unauthorised construction namely 9th floor, and shops erected were ordered to be demolished, question would be different. The act of the officers is in clear breach. So far as an engineer, an architect, structural engineer or clerks of works are concerned, they were the persons working for the developers. The builder / developer / engineer, etc., will have to understand for their liability themselves inter se.

##. In the case of EMPIRE CONSTRUCTION & HOTEL V. MUNICIPAL CORPORATION OF THE CITY OF AHMEDABAD, REPORTED IN 1995 (2) GLR 1293, the Court considered the provisions contained in sections 260 and 263 of the Act. In the said decision, it is held that a citizen cannot invoke Article 14 of the Constitution to perpetuate a wrong because no action is taken in respect of another citizen. The Court pointed out in para 7 as under.

7. The above provisions from the Bye-laws and Regulations of the respondent Corporation made it necessary for the petitioner to provide

for parking space in the plan of the building and which admittedly was shown in the cellar of the building as noted above. It is clear while putting up the partition walls in the said cellar, the space intended for parking purpose was converted by such construction into other use to which the said area is now being put to by the petitioner. Provisions of Sec.254(1)(d)(ii) of the said Act require that every person who shall intend to make alteration in a building involving conversion of any passage or space in the building into a room or rooms shall give notice to the Commissioner, in the form prescribed in the Bye-laws, containing the information required to be furnished under the Bye-laws. therefore, if the conversion of any space such as parking space is made into a room or rooms by erecting partition walls contrary to the provisions of the Rules or Bye-laws, provisions of Sec.260 would be attracted and proceedings can be taken by the Municipal Commissioner in respect of such conversion of parking space into rooms. therefore, the Municipal Commissioner was authorised to take proceedings against the petitioner under Sec.260 of the said Act and the impugned order falls within the powers conferred on the Municipal Commissioner under the said Act. The expression "Commissioner may remove" appearing in Sec.260(2) of the said Act does not authorise the Commissioner not to take action in cases where no sufficient cause is shown and the contravention of provisions of the Rules or Bye-laws is established. In other words, it would not be open for the Commissioner to arbitrarily decide as to against whom action should be taken and against whom it should not be taken. The discretion, if any, under sub Sec.(2) of Sec.260 cannot be arbitrarily exercised and the Commissioner is required to function keeping in view the purpose underlying the said provision, namely, removal of building or work which is found to be in contravention of the Rules or Bye-laws. From inaction, if any, in cases similar to that of the petitioner's building, it cannot be inferred that the Municipal Commissioner has taken any decision not to proceed against other similar breaches of Rules or Bye-laws."

##. In the case of LUCKNOW DEVELOPMENT AUTHORITY vs.

M.K. GUPTA reported in (1994) 1 SCC 243, the Apex Court observed in paragraph 8 (page 259) as under:-

"' The theoretical concept that King can do no wrong has been abandoned in England itself and the State is now held responsible for tortuous act of its servants. The First Law Commission constituted after coming into force of the Constitution on liability of the State in tort, observed that the old distinction between sovereign and non-sovereign functions should no longer be invoked to determine liability of the State. Friedmann observed:

"It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and non-governmental function, but the nature and form of activity in question.

xxxx xxxx xxx xxx xxxx

In any case the law has always maintained that the public authorities who are entrusted with statutory function cannot act negligently. As far back as 1878 the law was succinctly explained in Geddis v. Proprietors of Bann Reservoir thus:

"I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing what the Legislature has authorised, if it be done negligently."

Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can

claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. .. "'

In paragraph 10 (at page 262) the Apex Court observed thus:

"The jurisdiction and power of the courts to indemnify a citizen for injury suffered due to abuse of power by public authorities is founded as observed by Lord Hailsham in Cassell & Co. Ltd. v. Broome on the principle that 'an award of exemplary damages can serve a useful purpose in vindicating the strength of law'. An ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law. It acts as a check on arbitrary and capricious exercise of power. In Rookes vs. Baranard it was observed by Lord Devlin 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it."

##. In the said judgment, the Apex Court examined the question that today the issue thus is not only of award of compensation but who should bear the burnt? The Court pointed out that when the Court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the taxpayers money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. The Apex Court also pointed out that in case amount is directed to pay from the public fund, the same should be recovered from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionary.

##. In the case of PRATIBHA COOPERATIVE HOUSING SOCIETY

V. STATE OF MAHARASHTRA, reported in (1991) 3 SCC 341, the Apex Court has pointed out as under.

> "We are also of the view that the tendency of raising unlawful construction and unauthorized encroachment is increasing in the entire country and such activities are required to be dealt with by firm hands. Such unlawful constructions are against the public interest and hazardous to the safety of occupiers and residents of multi-storey buildings."

###. In para 7 of the judgment in PRATIBHA's (supra) case, the Apex Court observed that this case should be of pointer to all the builders that making of unauthorized construction never pays and is against the interest of the society at large. The rules and regulations and byelaws are made by the Corporations or development authorities taking in view the larger public interest of the Society and is a bounden duty of the citizens to obey and follow such rules which are made for their own benefits.

###. The nature of the construction, if permitted, would affect the public at large. Individual has a right including the fundamental right within a reasonable limit, It inroads the public rights leading to public inconvenience and therefore it is to be curtailed to that extent. It is required to be noted that under the provisions restrictions are imposed to ward off all possible public inconvenience and for safety. There is gross violation of building regulation, byelaws and in breach of of building plans, rules and building regulations, building is erected. One must bear in mind that the violation of the concerned setback will not make it feasible for the Corporation to widen the abutting road in future and that will bring an individual closer to the danger of the road. Waiver of requirements cannot be permitted for several reasons. It would deprive the adjacent plot, its occupants of light and air and also make it impossible for fire engine to be used to fight a fire in high rise buildings. The violation of FSI will result in undue strain on civic amenities such as water, electricity, sewage collection and disposal. It is required to be noted that the absence of requirements regarding fire staircases and other fire prevention and fire fighting measures would seriously endanger the occupants resulting in the death trap causing severe inconvenience to the public at large in case of fire.

###. With regard to illegal constructions, only the constructions on one road, i.e. C.G. Road, must be a pointer to the authorities to indicate that without the blessings and unwritten consent of the officers of the local authority, the constructions could not have been completed and the premises could not have been put for use and occupation. In Appeal from Order No.441 of 1998 with regard to unauthorised construction, in paragraph 32, the Court observed as under:-

"In the year 1997, when Special Civil Application No. 9988/1985 was heard the aforesaid aspects were considered. It was also pointed out to the Court hearing that application that only on the CG road, there are 57 new constructions of buildings, out of which only 11 buildings have provided parking place, but the other, though in the plans indicated that they have provided for parking, in fact, have not provided parking. It was also noted that there are some buildings for which Building Use Permission is not granted, and yet the buildings are used for shops, offices and hotels. Parking place has been converted into shops. Counsel for the Municipal Corporation submitted in that matter that the residential zone has been converted into commercial zone by unauthorised act of the builders or the occupiers. Even then, till today, we find that in most of the cases, no action has been taken by the Corporation and in some cases they are restrained from taking action either by an order of injunction status quo or stay or have illegally charged fees and has allowed the use contrary to law/Rules, which are not carried in the appeal and the Corporation has kept mum thereafter".

###. Learned counsel appearing for the builder submitted that the High Court cannot issue writ and therefore, this Court should not pass any further orders. He further contended that the remedies are available to the persons whose shops have been demolished on account of the unauthorised construction made by the builder as per the say of the Corporation which has been accepted by the Court. In the case of COMMON CAUSE A REGISTERED SOCIETY V. UNION OF INDIA, (1999) 6 SCC 667,the Apex Court pointed out as under.

"39. Under Article 226 of the Constitution, the High Court has been given the power and jurisdiction to issue appropriate writs in the

nature of mandamus, certiorari, prohibition, quo warranto and habeas corpus for the enforcement of fundamental rights or for any other purpose. Thus, the High Court has jurisdiction not only to grant relief for the enforcement of fundamental rights but also for " any other purpose" which would include the enforcement of public duties by public bodies. So also, the Supreme Court under Article 32 has the jurisdiction to issue prerogative writs for the enforcement of fundamental rights guaranteed to a citizen under the Constitution."

###. It is required to be noted that in the instant case, large number of occupiers were put in possession of the shops and offices by the builder/developer who has constructed unauthorisedly in violation of the laws. The builder could erect the building on account of the sheer negligence of the executive or administrative authorities of the Ahmedabad Municipal Corporation. Without the permission of the Corporation, building could not have been erected and without the supply of essential services, building could not have been occupied for use and therefore, when on account of wilful omission or negligence or consent or connivance on the part of the officers of the Corporation, builder/developer is permitted to carry out the construction in breach of law and if persons are put in possession by the builder/developer without the building use permission being granted, the injury which is caused to the persons would attract the provisions of public law. The Apex Court in the aforesaid case pointed out as under.

"Public law field, since its emergence, is ever expanding in operational dimension. Its expanse covers even contractual matters. Public law remedies have also been extended by the Supreme Court in realm of tort. In exercise of jurisdiction under Article 32 of the Constitution, this Court has awarded compensation to the petitioners who suffered personal injuries at the hands of the officers of the Government and the causing of injuries which amounted to tortious act was compensated by the Court."

###. It is at this stage necessary to refer to the case of Mrs. Manju Bhatiya & others v. New Delhi Municipal Council and others [(1997) 6 SCC 370]. The Court considered the case of construction of the building known as "White House" which came to be constructed and

possession was delivered to the purchasers, the appellant being one of them. At a later stage, it was found that the builder constructed the building in violation of the building regulations. Consequently, flats of the top 4 floors were demolished. The Court pointed out "general principles of equity" in para 5 which is as under.

"5. "General Principles of Equity" that `equity' is a word with many meanings. In a wide sense, it means that which is fair and just, moral and ethical; but its legal meaning is much narrower".

"Developed system of law has ever been assisted by the introduction of a discretionary power to do justice in particular cases where the strict rules of law cause hardship. Rules formulated to deal with particular situations may subsequently work unfairly as society develops. Equity is the body of rules which evolved to mitigate the severity of the rules of the common law."

"Principles of justice and conscience are the basis of equity jurisdiction, but it must not be thought that the contrast between law and equity is one between a system of strict rules and one of broad discretion. Equity has no monopoly of the pursuit of justice. Equitable principles are rather too often bandied about in common law courts as though the Chancellor still had only the length of his own foot to measure when coming to a conclusion. Lord Radcliffe, speaking of common lawyers, said that equity lawyers were "both surprised and discomfited by the plenitude of jurisdiction and the imprecision of rules that are attributed to `equity' by their more enthusiastic colleagues". Just as the common law has escaped from its early formalism, so over the years equity has established strict rules for the application of its principles. Indeed, at one stage the rules became so fixed that a "rigor aequitatis" developed; equity itself displayed the very defect which it was designed to remedy. We will see that today some aspects of equity are strict and technical, while others leave considerable discretion to the court."

###. The Apex Court examined the question pertaining to the building contract in para 6 and pointed out as under.

"Whenever a contractor is liable to a third person in this way, the building owner may also be vicariously liable for the builder's acts or omissions, or, perhaps more correctly, will be a joint tort-feasor."

###. The Court quoted with the approval of section 2 dealing with "damages" wherein the author has stated as under.

"Under the complicated provisions of many building contracts the possible breaches of contract by the contractor are numerous, and in each case, the general principles set out must be applied in order to determine what, if any, damage is recoverable for the breach in question. Typical breach of the less common kind are, for example, unauthorised sub-contracting, failure to insure as required, failure to give notices, payment of unauthorised wages, and so on, which, depending on the particular circumstances of the case, may or may not cause damage. The commonest breaches causing substantial damage, and hence giving rise to litigation, may be broadly divided into three categories, namely, those involving abandonment or total failure to complete, those involving delay in completion, and those involving defective work."

"In the case of defective work it should also be remembered that the final certificate may, in the absence of an overriding arbitration clause, bind the employer and prevent him from alleging defective work altogether, and many contracts where no architect is used, particularly private-developer sales (or sales of houses `in the course of erection') may, depending on their terms, extinguish liability upon the later conveyance under the caveat emptor principle."

###. The Apex Court dealt with the said principle and pointed out as under.

"The courts, in their desire to escape from the rule of fitness for habitation upon the purchase

> of a new house from a builder if the house is completed at the time of the contract of sale, have been able to justify a refusal to apply the rule of caveat emptor by finding that at the time of sale the house was `in the course of erection', and frequently apply the implied term as to habitability to houses which are virtually completed at the time of sale. Furthermore, while it might at first sight seem logical that the warranty of fitness should extent only to the work uncompleted at the time of sale, this difficulty has been brushed aside, and, once a building has been held to be in the course of erection, the warranty has been applied to the whole building including work already done."

###. In the instant case, it is required to be noted that the law mandates that the person must obtain certificate for use of a building. The person who has erected the building and put persons in possession knowing full well his obligation to obtain certificate from the competent authority cannot be excused at all. After considering the question pertaining to "tortuous liability", "contract and tort", "breach of trust and other equitable obligations" etc. in para 11 the Apex Court pointed out as under.

> "11. In this backdrop, it would be seen that in the tort liability arising out of contract, equity steps in and tort takes over and imposes liability upon the defendant for unquantified damages for the breach of the duty owed by the plaintiff in a common law action for damages and enjoins upon the defendant to make the damages suffered by the plaintiff on account of the negligence in the case of the duties or breach of the obligation undertaken or failure to truthfully inform the warranty of title and other allied circumstances. In this case, it is found that four floors were unauthorisedly constructed and came to be demolished by the New Delhi Municipal Council. It does not appear that the owners of the flats were informed of the defective or illegal construction and they were not given notice of caveat emptor. Resultantly, they are put to loss of lakhs of rupees they have invested and given as value of the flats to the builder-respondent."

###. In the instant case, it is found that the 9th floor as well as shops in question which came to be demolished were erected unauthorisedly and the owners were not informed of the defective or illegal construction. Resultantly, occupiers were asked to suffer huge loss. The builder/developer also put others in possession by stating that the building is made for offices only which in fact could not have been used for the purpose other than the residential purpose and as such huge loss has been caused to the shopkeepers and others.

###. In view of the aforesaid decision of the Apex Court, the builder was impleaded as of the respondents herein and despite the builder was repeatedly called upon to produce plans which he had shown to the occupiers, he failed to produce the same. The builder could not have produced the plans approved by the Corporation as plans were never approved at the time when the persons were put in possession but the plans were approved much after.

###. It is also required to be noted that the difference between the public and private law was examined by the Apex Court in the case of NILABATI BEHERA ALIAS LALIT BEHERA V. STATE OF ORISSA & ORS [ (1993) 2 SCC 746] Dr. Anand, J (as His Lordship then was) in a separate concurring judgment laid down as under.

"34. The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of

penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of exemplary damages' awarded against the wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and persecute the offender under the penal law."

"35. This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law through appropriate proceedings. Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible. The decisions of this Court in the line of cases starting with Rudul Sah v. State of Bihar and Anr., [1983] 3 SCR 508 granted monetary relief to the victims for deprivation of their fundamental rights in proceedings through petitions filed under Article 32 or 226 of the Constitution of

> India, notwithstanding the rights available under the civil law to the aggrieved party where the courts found that grant of such relief was warranted. It is a sound policy to punish the wrongdoer and it is in that spirit that the Courts have molded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act unlawfully and do perform their public duties properly particularly where the fundamental rights of a citizen under Article 21 is concerned. Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply And the courts have to act firmly but with certain amount of circumspection and self restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitute for civil action in private law. Some of those situations have been identified by this Court in the cases referred to by Brother Verma, J."

###. The person engaged in erection of a building is required to erect the building in accordance with law and for such construction as pointed out in the regulations or bye-laws he has to approach the Corporation. As per the permission or deemed permission granted, he has to carry out construction but in any case, he cannot carry out construction by committing breach of building regulations. At the same time, it is the duty of the officers of the Corporation to visit the site and grant clearance for further erection of the building and for further stages. It was the duty of the builder to make an application for building use permission and after such permission is granted, he could have given possession to the purchasers. It was the duty of the Corporation not to supply essential services such as water and drainage without the building use permission granted by it. If law mandates that the building cannot be occupied without building use permission, it necessarily presupposes that it is the duty of the officers of the Corporation not to supply essential services such as drainage and water so as to see that the building is not used or occupied. Section 159 and section 161 of the BPMC Act makes it

clear that without the permission of the Commissioner, the owner or occupier is not entitled to cause his drain empty into the municipal drains. Violation of this provisions is an offence. Without BU Permission, the facilities of drainage could not have been provided. Thus, as stated earlier, the act of putting in possession of unauthorised construction is in breach of public duty by both the public officers and the developer/builder. In view of the aforesaid decision, the Court moulds the relief by granting compensation. In proceedings under Art. 226 of the Constitution of India, it is the duty of the Court under the public law to penalise the wrong doers and to fix the liability for the public wrong on the State/Corporation which has failed to discharge public duty and to protect the citizens. On account of failure in discharge of the duties by the officers of the Corporation, the persons were put in possession by the builder/developer. As pointed out by the Apex Court, it is only monetary amends and not the damages in the nature of exemplary damages against the wrong doers for breach of public law and is independent of their rights available to the aggrieved party.

###. In the instant case, it is clear that the public officers have either consented the act of erection of the building and occupation of the building or that act is on account of their connivance. Even if it is presumed that there was no consent or connivance, there is certainly omission on their part and this omission is willful. In a centrally located place in Ellisbridge area, if 4 multi-storey towers have come into existence, would it not be noticed by the officers of the Corporation in charge of the area? They were aware about the construction because the plans were before them. It is not their case that they were not aware about the erection of the building.

###. With regard to the submission made by the learned advocate appearing for the builder that the powers under Art. 226 of the Constitution of India cannot be exercised by the High Court in a matter where the Court has arrived at a conclusion that the construction is unauthorised and therefore the occupiers are entitled to the just compensation, one has to read the decision of the Apex Court in the case of ROHTAS INDUSTRIES LTD. & ANR. V. ROHTAS INDUSTRIES STAFF UNION AND OTHERS, [(1976) 2 SCC 82]. The Apex Court has pointed out as under.

"9. The expansive and extraordinary power of

the High Courts under Article 226 is as wide as the amplitude of the language used indicates and so can affect any person __ even a private individual __ and be available for any (other) purpose __ even one for which another remedy may exist. The amendment to Article 226 in 1963 inserting Article 226 (1A) reiterates the targets of the writ power as inclusive of any person by the expressive reference to `the residence of such person'. But it is one thing to affirm the jurisdiction, another to authorise its free exercise like a bull in a china shop. This Court has spelt out wise and clear restraints on the use of this extraordinary remedy and High Courts will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered. Speaking in critical retrospect and portentous prospect, the writ power has, by and large, been the people's sentinel on the qui vive and to cut back on or liquidate that power may cast a peril to human rights. We hold that the award here is not beyond the legal reach of Article 226, although this power must be kept in severely judicious leash."

###. The said decision has been again considered in the case of U.P. STATE COOPEARTIVE LAND DEVELOPMENT BANK LTD. V. CHANDRA BHAN DUBEY AND OTHERS [ (1999) 1 SCC 741 at page 753.

"10. Many rulings of the High Courts, pro and con, were cited before us to show that an award under Section 10-A of the Act is insulated from interference under Article 226 but we respectfully agree with the observations of Gajendragadkar, J. (as he then was) Engineering Mazdoor Sabha (SCR at p. 640) which nail the argument against the existence of jurisdiction. The learned Judge clarified at p. 640:

"Article 226 under which a writ of certiorari can be used in an appropriate case, is, in a sense, wider than Article 136, because the power conferred on the High Courts to issue certain writs is not conditioned or limited by the requirement

that the said writs can be issued only against the orders of Courts or Tribunals. Under Article 226 (1), an appropriate writ can be issued to any person or authority, including in appropriate cases any Government, within the territories prescribed. Therefore, even if the arbitrator appointed under Section 10-A is not a tribunal under Article 136 in a proper case, a writ may lie against his award under Article 226'."

"20. The term `authority' used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers powers on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words `any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied."

"22. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: `To be enforceable by mandamus a public duty does not necessarily have to be one imposed by charter, common law, custom or even contract'. We share this view. The judicial control over the fast-expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available ` to reach injustice whereever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We,

therefore reject the contention urged for the appellant on the maintainability of the writ petition."

###. In the case of MISCELANEOUS MAZDOOR SABHA & OTHERS V. STATE OF GUJARAT & OTHERS [ 1992 GLR 1065], the moot question before the Court was whether a private company like respondent no. 3 or others can be covered by the phrase of `any person" employed by sub-clause (1) of Art. 226? In that case, there was closure of a unit and thus, large number of persons were affected by that action. It was not the case of the individual termination of employment. The Court pointed out as under in the aforesaid judgment.

"This was not the case of individual termination of employment either on the ground of misconduct or on the ground of retrenchment as retrenchment presupposes that when the concern is going on, some working force as contra-distinguished from the entire working force, gets terminated from service."

"... These would be individual disputes pertaining to one or two or number of workmen similarly situated as compared to their other colleagues who are still retained in service. So far as such grievances are concerned, even though employers may not be liable to be proceeded against under Art. 226(1) as being `person', they may not be liable to be proceeded against under Art. 226(1) as their actions would remain in the domain of private rights and obligations."

###. The Court pointed out in para 12 about the statutory obligation as under.

"...If these statutory obligations cast on the company like respondent no. 3 are in the domain of private duty and not public duty, then obviously the petitioner's petition would not lie and the remedy will be by way of proceedings under the Act.

"In our view, when the entire working force in a concern is dispensed with without following the statutory provisions of Secs. 25FFA and 25FFF, it cannot be said that such wholesale termination

would still remain in the domain of private rights and obligations between the concerned workmen on the one hand and the employer on the other. But such wholesale termination contrary to these provisions would project a picture of violation of public duty as it affects the entire working force and their dependents. Such action would, also be violative of Art. 21 of the Constitution and even if petition under Art. 226 may not lie against such companies for enforcement of Art. 21, still the question will remain whether they can with impunity violate statutory obligations flowing form Secs. 25FFA and 25FFF and in an arbitrary manner dispense with the entire working force of their concerns and still urge that what they have done is affecting private rights and duties and statutory obligations enacted to control such actions are not imposing public duties. In our view, such a contention would not be available to the concerned respondent on such fact situations. Provisions like Secs. 25FFA and 25FFF have been enacted by the Legislature with a view to seeing that the concerns do not snap the livelihood of entire segment of working force as it is bound to spell economic disaster for vast segment of the society consisting of not only the entire working force but their large number of dependents who would be put to economic death. Consequently, when the dispute does not remain between a workman or a group of workmen on the one hand and the employer on the other but it becomes comprehensive one encompassing the entire working force and when it is alleged that this is done in breach of statutory duty on the part of the employer, then in such contingencies, once the employer is covered by the sweep of Art. 226(1) even a private employer would be liable to be called upon by a writ of mandamus or any other suitable writ, order or direction in the nature of mandamus to perform its statutory obligations of public nature flowing from such action on its part, and to suffer the consequences of its action being declared null and void."

###. It is required to be noted that the case of an individual giving a contract for erecting a building for his own bungalow would stand on different footing. But when the builder/developer invites people by putting in circulation brochure, advertisement etc. to buy flat/

office, shop etc. it does not become the case of an individual person entering into a contract with other individual. When a premises is erected in violation of the buildings regulations and the same is put in use without permission, large number of persons are likely to be affected. In such a contingency, the matter is to be viewed in a different manner. Breach of provisions of law/regulations for the benefit of public at large, would fall within the ambit of breach of public duty. When in breach of the regulations the builder erects the building and without bringing to the notice of the persons interested in buying the property, the nature of defective/unauthorised construction of such property puts them in possession, the builder/developer/engineer, structural engineer, clerk of works/ officers of the Corporation, - all concerned act in violation of public duty. The builder was required to erect the building as per the regulations and his action was required to be checked by the officers of the Corporation. As stated earlier, Building Use Permission was compulsory to put others in possession and only thereafter essential services could be provided. But in the instant case, without the plans being approved, the building was erected and the essential services were provided by the Corporation and this could not have been done without the consent or connivance or omission or commission of the officers of the Corporation. Therefore, this situation is required to be considered from a different angle altogether.

###. What the Division Bench has stated in para 13 in the case of MISCELLANEOUS MAZDOOR SABHA V. STATE OF GUJARAT & OTHERS [1992 (2) GLR 1065] is required to be considered at this stage. In para 13, it is pointed out by the Division Bench as under.

"13. It is true that mandamus or writ in the nature of mandamus cannot be issued to any person unless the concerned person is enjoined to exercise a public duty. However, as seen above, the aforesaid statutory provisions of the Act do impose a public duty on the concerned employer when he decided to close down the concern and to dispense with the entire working force. The statute itself has provided for certain guidelines and procedural safeguards to be followed and once these statutorily imposed procedural safeguards are thrown to the winds by the concerned employer, result would be that his action will spell utter disaster to a sizeable

> segment of society, viz., the entire working force as well as members of their families depending on them. Such type of provision, therefore, has to be treated to be a provision imposing statutory public duty on the concerned employer. In this connection, we may profitably draw upon the analogy of situations wherein there are disturbances of `law and order' on the one hand and `public order' on the other. It is well settled by a catena of decisions of the Supreme Court and this Court that individual assault on a person on a public street may cause disturbance of law and order. But if the assault mounted is of such magnitude that it disturbs even tempo of public life in a given locality, it would amount to disturbance of public order. Similarly, if the action of the employer hurts an individual workman or group of workmen similarly situated but does not harm their colleagues who continue to work in the concern, the nature of statutory obligation cast on the employer while passing the orders of termination of services of the concerned individual workman or group of workmen may remain in the realm of private duty and may not be available for being corrected by a writ of mandamus, but if the action of the employer in closing down the concern results in uniform treatment to the entire working force and if it is alleged to be contrary to the statutory procedure enacted by the legislature for safeguarding the entire working force in the concern and which would naturally include safeguarding interest of the dependent family members who are total outsiders to the employer-employee relationship and who also are likely to suffer from economic death on account of their bread winners losing livelihood, then in such cases of comprehensive breaches of statutory obligations, where public policy itself would remain violated and stultified, even tempo of public life of sizeable segment of society would stand disturbed and to that extent, therefore, the action of the employer would amount to breach of public duty cast on it by the relevant statutory provisions like Secs. 25FFA and 25FFF."

###. In the instant case, para 13 of the aforesaid judgment is to be read with greater force. From the provisions contained in the Bombay Provincial Municipal

Corporation Act and the building regulations as applicable, it is very clear that the statutory provisions of public duty are imposed on the concerned builder/developer/owner when it is decided to erect a building.

###. That was the case by which several persons were affected on account of the action sought to be taken by the employer. This is also a case where number of shopkeepers, occupiers of the office complex and the persons who occupied 9th floor are the sufferers including their family members as the shopkeepers and others would not be in a position to carry on their business at their place and that would certainly attract the provisions.

###. In the instant case from the material placed before the Court, the following facts emerge.

(i) Builder/developer invited public to buy flats/offices/shops to be erected in 4 towers known as "Centre Point".

(ii) The Division Bench of this Court has pointed out that the area where the building in question was erected was at the relevant time in "predominantly residential zone". Even today also, it is in predominantly residential zone and therefore, the premises can be used only for the purpose of residence.

(iii) The Division Bench of this Court pointed out that from the plans it is clear that the permission was sought for erection of 8 storied building for residential use. Cellar was to be used for parking only and the shops on the ground floor bearing numbers 28, 29, 30, 31, 44, 45, 46 and 48 were not in the original plan. In the place meant for parking and public amenities shops were constructed unauthorisedly in breach of the provisions contained in various provisions. The 9th floor was constructed in the tower in question in breach of building regulations and no permission could have been granted by the Commissioner in view of the restricted height.

(iv). It is clear from the record that the persons with whom the builder entered into agreements were not shown the plans. The builder has not produced the plans before the Court alleged to have shown to the shopkeepers. That plans being in his

possession, it was for him to produce the same before the Court.

(v). Moneys were taken from the shopkeepers by making representation that the builder will construct the building in accordance with the building plans prepared by M/s. Hasmukh C. Patel, Architects of Ahmedabad and that the builders will be entitled to make changes and variations in the said building plans as required by the Municipal Corporation of Ahmedabad which the builder may deem fit and appropriate and the purchasers irrevocably consented to the builder to carry out such changes. The builder/developer has not produced before the Court the plans prepared by M/s. Hasmukh C. Patel or even he has not placed before the Court plans approved by the Corporation as stated by him in subclause (D) of clause 1, but in the proceedings, the Corporation being respondent-party has produced the plans and the builder, though obliged has not carried out changes as per approved plans. It appears that at no point of time, the changes made in the plan were brought to the notice of the occupiers and in fact, the plans have been approved much after the persons were put in possession. It is an admitted fact by one of the partners of M/s. Hasmukh Shah, that the entire project including the office complex was not completed and the building use permission was not obtained, yet the builder/developer delivered possession of the premises booked by the persons concerned. Thus, it is clear that in violation of the provisions contained in the BPMC Act, the builder permitted the shopkeepers to occupy the premises and it was his duty not to permit anyone to occupy the building without the building use permission being granted. (Sec. 263 of the BPMC Act). The construction being unauthorised and demolished by the Corporation, the builder is liable to pay just compensation.

###. In the instant case, in view of the facts which are placed before the Court, it is proved beyond reasonable doubt that the builder collected money for erection of shops and the 9th floor which were erected in contravention of the provisions of the building regulations and were required to be demolished. The builder could not point out that the purchasers were made aware about unauthorised construction at the time when they were handed over possession of the premises. These

material facts were suppressed. In a case like this where the trial court or the appellate court or the revisional court is required to examine the record and the Court is satisfied about illegal or unauthorised construction, then to avoid duplication of trials, the Court should make endeavour to do justice by awarding just compensation. Just compensation would mean amount received by the builder for erection of the building and the interest thereon. However, with regard to damages, if any claim is made for which further evidence may be required, then in such case for such part of the claim if Civil Suit is filed for damages then at the time of awarding damages in subsequent Civil Suit relating to the same matter, the court has to bear in mind the sum paid or recovered as compensation awarded by the Court. The instant case is not a case of breach of contract. The shopkeepers suffered on account of negligence /consent/connivance on the part of the officers of the Corporation and also on account of breach of the obligation undertaken to erect the building in accordance with building regulation and failure to truthfully inform the warranty of title and other allied circumstances. It is not a case of breach of contractual rights but they were put in possession of a property the erection of which was found to be illegal and that was demolished. There is no need of oral evidence for deciding the dispute and the matter is to be considered in the facts and circumstances of the case and documentary evidence placed on record.

###. Is it not a case of fraud on statute by the persons interested? Why the building was erected without the plans being sanctioned or why the persons were put in possession without the building use permission being granted? Why essential services were provided by the officers of the Corporation? A picture was created as if the building was erected in accordance with law.After the plans are drawn by the Architect, the builder represents that he will make necessary changes, ordinary man who is not conversant with this branch of law would accept the statement made by the builder before him and would act accordingly. But in the instant case, at no point of time,shopkeepers were informed about the correct position and were put in possession. This is not an act of one person and the persons concerned did not bother to follow the provisions and obviously in view of such situation, it can be said that the persons interested joined hands and committed fraud and obtained monetary gain. When builder made a representation about the erection of a building as per plan and would make changes as required

by Corporation (so as to bring the erection with the conformity of regulations) and as the essential services were provided by the Corporation no doubt would be raised by a citizen. In the instant case, it is further required to be noted that the document namely plans which were shown to the shopkeepers have not been produced by the builder. It may be that some plans were shown but it is not the case of the builder also that the plans which were approved by the Corporation were shown. Thus, the plans were shown with an intention to make the people to believe that what the builder is doing is as per the plan. If plans which were shown to the shopkeepers would have been produced, it would have been clear whether the plans exhibited by the builder were approved by the Corporation or not. What is the reason that those plans are not produced before the Court?

###. Officers of the Corporation were armed with power coupled with the duty. Power to regulate the erection of building activities goes with the obligations and functions to give power of regulation stretches beyond the same. Grant of permission checks within its sweep of power in appropriate cases to revoke or cancel permission as incidental or supplemental power to grant. Otherwise, power to regulate would be whittled down or even frustrated and with such wide powers given, if officers of the Corporation are acting arbitrarily, they must be held liable. In the instant case, they have acted contrary to law by providing essential services without the building use permission being granted and without the building plans being approved. They have neither inspected before granting B.U. Permission nor have taken any action.

###. In the case of DELHI DEVELOPMENT AUTHORITY V. SKIPPER CONSTRUCTION CO. (P) LTD. & ANOTHER [(1996) 4 SCC 622] the Apex Court has observed in para 37 as under.

> "37. Before parting with this case, we feel impelled to make a few observations. What happened in this case is illustrative of what is happening in our country on a fairly wide scale in diverse forms. Some Persons in the upper strata [which means the rich and the influential class of the society] have made the 'property career' the sole aim of their life. The means have become irrelevant - in a land where its greatest son born in this century said "means are more important than th[e ends". A sense of bravado prevails; everything can be managed;

> every authority and every institution can be managed. All it takes is to "tackle" or "manage" it in an appropriate manner. They have developed an utter disregard for law nay, a contempt for it; the feeling that law is meant for lesser mortals and not for them. The courts in the country have been trying to combat this trend, with some success as the recent events show. But how many matters can we handle. How many more of such matters are still there? The real question is how to swing the polity into action, a polity which has become indolent and soft in its vitals? Can the courts alone do it? Even so, to what extent, in the prevailing state of affairs? Not that we wish to launch upon a diatribe against anyone in particular but Judges of this Court are also permitted, we presume, to ask in anguish, "what have we made of our country in less than fifty years"? Where has the respect and regard for lag gone? And who is responsible for it?"

###. After the Urban Land (Ceiling & Regulation) Act, 1976 was brought into force, situation changed and the Hon'ble Law Minister while repealing the Act has stated on the floor of the Parliament as to how the Act was misused. We need not repeat the same here. Suffice it to say that in view of the provisions contained in the Bombay Tenancy and Agricultural Lands Act, a person other than farmer within the area stipulated cannot buy any land for any purpose other than the agriculture. The property careers, not only in breach of the provisions contained in the Urban Lands (Ceiling & Regulation) Act, 1976, but also in violation of building regulations construct properties so as to enrich themselves. Suffice it to say that in the decision which this High Court has delivered in Special Civil Application No. 6794/92 decided on 4.10.2000, in case of Consumer Protection Council vs. Ahmedabad Municipal Corporation, the Division Bench considered the submissions in detail and pointed out the fantastic increased use of vehicles. The Court considered the decisions of the Apex Court reported in AIR 1986 SC 180 (Olga Tellis) and of Ahmedabad Municipal Corporation vs. Nawabkhan Gulabkhan reported in AIR 1997 SC 152. The Court emphasised on use of public street that there should be no obstruction in flow of Traffic or passing/repassing by the pedestrians. Division Bench pointed out in para 54 of the judgment in the case of Consumer Protection Council that if parking as required is not provided by the builder/developer, occupier would park their vehicles on the public road.

Considering several aspects rule makers have made specific provision of providing parking and that cannot be converted in shops or flats. The builder/developer cannot put others in possession by converting the parking or public amenities into shops. The Act which is illegal was known to him.

###. Even the Commissioner pointed out that about 9200 unauthorised structures have been erected which can be divided into major breach, minor breach and erection of buildings on lands belonging to Corporation or the State. If that is not dealt with strictly many more structures would come up. Widening of the roads at public cost will be futile exercise. The buildings are erected in violation of Building Regulations and in some cases, there is extensive breach of FSI but surprisingly all the buildings are provided with the amenities such as water and drainage. Could it be done without the active assistance of the officers of the Corporation?

###. In this matter, question of public accountability is involved. The Apex Court in the case of MAHESH CHANDRA vs. REGL. MANAGER, U.P.F.C. reported in (1993) 2 SCC 279 and in the case of LUCKNOW DEVELOPMENT AUTHORITY reported in (1994) 1 SCC 243 has pointed out this aspect.

###. The Apex Court has pointed out in DR. G.N. KHAJURIA vs. DELHI DEVELOPMENT AUTHORITY reported in (1995) 5 SCC 762 as under:

"10. Before parting, we have an observation to make. The same is that a feeling is gathering ground that where unauthorised constructions are demolished on the force of the order of the courts, the illegality is not taken care of fully inasmuch as the officers of the statutory body who had allowed the unauthorised construction to be made or make illegal allotments go scot free. This should not, however, have happened for two reasons. First, it is the illegal action/order of the officer which lies at the root of the unlawful act of the citizen concerned, because of which the officer is more to be blamed than the recipient of the illegal benefit. It is thus imperative, according to us, that while undoing the mischief which would require the demolition of the unauthorised construction, the delinquent officer has also to be punished in accordance with law. This however, seldom happens.

> Secondly, to take care of the injustice completely, the officer who had misused his power has also to be property punished. Otherwise, what happens is that the officer, who made the hay when the sun shined, retains the hay, which tempts others to do the same. This really gives fillip to the commission of tainted acts, whereas the aim should be opposite."

###. The Court has pointed out on several occasions that there should be accountability and liability of public servants in administrative matters, and there should be transparency in all what they do. The Apex Court in the case of COMMON CAUSE vs. UNION OF INDIA reported in (1999) 6 SCC 667 has pointed out (see Head Note "O") that Executive or administrative actions of State or its instrumentalities or statutory or public bodies which are in violation of fundamental rights or which are arbitrary or oppressive in violation of Art. 14 or any statute are open to judicial review.

###. In the result, the builder and its partners are held liable to return the amount taken from the purchasers of the shops illegally constructed in the parking place and common amenities, i.e. shops No. 1 to 7, 11 to 27, 28, 29, 30, 31, 44, 45, 46 and 48 and, therefore, are directed to return it along with 15% of interest from the date of taking the amount till the date of payment of the amount, except for shops belonging to Nilkamal Patel (Shop No. 28) and Siddharth Mehta (Shop No. 46), about whom we were told that they shall settle the dispute out of the Court). Occupier of the 9th floor, represented by learned Advocate Mr. Puj, also conveyed that his client will settle the matter out of the Court. As regards shops No. 8, 9 and 10 it is submitted before us that they have subsequently purchased the shops from the original allottees in the year 1998-99 and they are entitled to the price what they have paid. We therefore direct that they be paid the price by the builder which they have paid to the original allottees as reflected in paragraph 40 of the judgment, and we are not inclined to grant any interest to them. The amount as directed shall be paid within four weeks. The builder is held liable for exemplary cost of this proceedings. The builder and its partners jointly and severally are held liable to pay to each shopkeepers who are adversely affected, the sum of Rs. 10,000/- by way of cost, except the owner of 9th floor and two shopkeepers, viz. Nilkamal Patel (shop No. 28) and Siddharth Mehta (shop No.46). Exemplary cost of Rs.50,000/- shall be deposited by the builder in the court within four weeks which shall

be remitted to the State Exchequer. The cost shall also be paid within a period of four weeks from today. It goes without saying that this amount of compensation is not determined as per the prayer made but it is just compensation.

###. It was for the Corporation to see that the building is erected in accordance with the Building Regulations. It was for the Corporation to see that common amenities and parking facilities are provided and that the 9th Floor was not constructed. It is a matter of surprise that the day on which the plans were approved, 9th floor was already erected, yet these Officers of the Corporation have not taken any action in the matter. A serious view of the matter is required to be taken against the Ahmedabad Municipal Corporation also. It is a matter of great surprise that before the plans are approved, even the Corporation has provided the drainage system to the occupiers of the building. This clearly indicates that erection of building could not be without the unwritten permission or blessings of the officers of the Corporation. It is very clear that the Officers of the Corporation have aided or abetted in the act of illegal erection of the building. Therefore, it is a fit case wherein directions are required to be given to the Corporation to pay only 10% (ten percent) of the amount of compensation of the principal amount and not interest, which is required to be paid by the builder/developer to each of the shopkeepers affected. The amount shall be deposited with the Registry of this Court which will be paid to the builder subsequently only after he has complied with the order with regard to return of the amount to the aforesaid shopkeepers. We are of the view that but for the act of negligence or connivance, the building could not have been erected. In the manner in which it has come into existence, it would be for the Commissioner to recover the amount from the erring Officers, by examining the record from the stage of submission of plans till the date of filing of the present petitions for their act/omission, etc., and for providing drainage and water connections, etc. If the drainage connection was connected without written permission of the Commissioner or if the permission has been obtained by mis-representation, the question is how it could be continued.

###. The builder has not provided firesafety measures as required under the BPMC Act and the Rules. By order dated 25.07.2000 passed in Special Civil Applications No. 4578/1997 with 6258 of 2000, a Division Bench of this Court directed that in all highrise buildings in

Ahmedabad, fire safety measures are to be provided. It was also directed to issue public notice to provide firesafety measures in high-rise buildings within a period of four weeks from the date of publication. The provisions with regard to firesafety is also discussed in the order passed by this Court on 24/08/2000 passed in SCA No. 8553 of 2000 and others, wherein a Division Bench of this Court quoted the observations made by another Division Bench in Spl. C.A. No. 4578 of 1997. However, the State came out with an Ordinance, known as the Gujarat Regularisation of Unauthorised Development Ordinance 2000 (Gujarat Ordinance No. 6 of 2000) published on 22.11.2000.

We have perused the provisions contained in the Ordinance. Sub-clause 4 of Section 4 of the Ordinance relates to firesafety measures. Sub-clause 4 (c) is applicable in the instant case which only provides that the designated authority may permit installation of diesel generating set instead of electric supply to the main fire pump within a period of three months. Section 4 (5) provides that where a person fails to comply with directions given to him by the designated authority, the designated authority shall install the required fire safety equipments and recover the cost thereof from the person as an arrear of land revenue.

People residing in highrise buildings cannot be left to the mercy of the Babus / Bureaucrats who failed in exercising their powers in this case which is clear from the various decisions of the Courts. Even after the Ordinance, we have not come across a single case wherein direction is issued by the designated authority to provide firesafety measures. The judgment was delivered in SCA No. 4578/97 with 6258/2000 on 25.7.2000. Even after the direction issued by this Court and confirmed by the Apex Court (by rejecting leave to Appeal), the citizens residing in highrise buildings are again at the mercy of the government. The directions were given with a view to see that people get protection, but in view of the Ordinance, the provisions are not enforced. As indicated, the discretion is given only whether to use the electric motor or diesel generating set and nothing more, insofar as firesafety measures are concerned. The Ordinance does not say that fire safety measures are not to be provided in highrise buildings. Under the circumstances, we call upon the Municipal Commissioner to remain personally present before the Court on 16.3.2001 and to explain as to why no actions are taken by him though the Commissioner is the designated authority under

the ordinance.

In view the ordinance No.6 of 2000, every builder who is duty bound, is taking shelter under the provisions of the Ordinance. Neither the State government nor the Municipal Corporation has provided fire safety measures. Under the umbrella of the Ordinance, the builders who were duty bound to provide fire safety measures are protected. We do not express any opinion about the legality or otherwise of the Ordinance No.6 of 2000 as the said Ordinance is challenged and the issue is pending before another Division Bench.

It is required to be noted that earlier the Government itself made mandatory provisions in view of the National Building Code, to provide firesafety measures in highrise buildings. However, it seems that the same was a mere show. The Government, on one hand is framing law, and on the other hand do not take any effective steps for implementation of the law. The Babus / Bureaucrats were and are required to implement the provisions for the safety of people at large, failed in discharging their duties. BU Permission could not have been granted without provisions of fire safety measures. High-rise buildings without firesafety measures have come up because the officers of the Municipal Corporation failed in discharging their duties. Hence, without expressing any opinion about the legality or otherwise of the Ordinance, considering the provisions of Ordinance No. 6 of 2000, it would be most appropriate to direct the Ahmedabad Municipal Corporation to provide fire safety measures as required under the National Building Code as adopted by Ahmedabad Municipal Corporation within a period of two months and the Corporation shall thereafter recover the cost of the same from the builder, as it was his responsibility to provide the building with fire safety measures.

###. Special Civil Applications No. 8931 of 2000 and 8781 of 2000 are allowed accordingly. Special Civil Application No. 8930 of 2000 (converted from C.A.No. 7028 of 2000) was filed as the Corporation has issued notice for the use of shops No. 48 and 54 on the ground floor. So far as shop No. 54 is concerned, the Court, in the earlier order, has not recorded any finding. However, with regard to shop No. 48, a finding has been recorded, and, therefore, Spl. C.A. No.8930/00 is

allowed only qua shop No. 54 is concerned, and the petition accordingly is allowed partly. Spl. C.A. 8593/200 stand rejected.

( B.C. PATEL, J. )

csm./ (RAVI R TRIPATHI, J.)